Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent,
United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent,
United States of America ex rel.
AMBROSE ST. JOHN, Respondent,
United States of America ex rel.
JAMES R. KEEBLE, Respondent,
United States of America ex rel.
CURTIS SMALL, Respondent,
United States of America ex rel.
ROMAN V. DERBY, Respondent,
United States of America ex rel.
JOSEPH DAY, Respondent,
United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent,
United States of America ex rel.
CLARENCE WALKER, Respondent,
United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.
(Nos. 73-1453 to 73-1459 and 73-1541 to 73-1543)
Eighth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

KERMIT A. SANDE
Attorney General
State of South Dakota
Suite A 304
Capitol Annex
Pierre, South Dakota 57501
JOHN J. SIMPSON
Box 147
Winner, South Dakota 57580
TOM D. TOBIN
422 Main Street
Winner, South Dakota 57580
Attorneys for Petitioner

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Court of Appeals
(Nos. 73-1453 to 73-1459 and 73-1541 to 73-1543)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals as yet unreported, appears at Appendix A, infra, pp. 1a-9a. The decisions and orders of United States District Court of South Dakota, Northern Division, as yet unreported appear at Appendix B, infra, pp. 10a-19a.

JURISDICTION

The judgment and opinion of the Court of Appeals was filed December 7, 1973. A timely petition for rehearing, and rehearing en blanc was denied on January 8, 1974. This petition is due on or before April 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

WHETHER OR NOT THE ACT OF MARCH 3, 1891, AMENDING AND RATIFYING AN 1889 AGREEMENT FOR THE OUTRIGHT CESSION AND SALE OF ALL THE UNALLOTTED LANDS OF THE LAKE TRAVERSE RESERVATION TO THE UNITED STATES GOVERNMENT FOR A SUM CERTAIN, DISESTABLISHED SAID RESERVATION AND RESTORED SAID LANDS TO THE PUBLIC DOMAIN.

STATUTES INVOLVED

Articles 3 and 10 of the Treaty of February 19, 1867, 15 Stat. 505, sections 26-30 of the Act of March 3, 1891, 26 Stat. 989, 1035, and 18 U.S.C. 1151 are set forth in Appendix C, infra, pp. 20a-39a.

STATEMENT OF THE CASE

These consolidated cases are the result of habeus corpus petitions initiated in the United States District Court of South Dakota, Northern Division, in which the petitioners below claimed that the State of South Dakota did not have jurisdiction to try, convict and sentence them to the South Dakota State Penitentiary because their criminal acts took place within the boundaries of the Lake Traverse Reservation. Accordingly, they requested that their sentences be vacated and they be released. The district court denied the writs of habeus corpus and the petitioners below appealed.

On December 7, 1973, the Eighth Circuit Court of Appeals reversed and remanded for proceedings consistent with its opinion.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH A 1973 SOUTH DAKOTA SUPREME COURT CONSTRUCTION OF THE IDENTICAL ACT.

Two months prior to the decision of the Court of Appeals in the instant case, the Supreme Court of South Dakota held that the unaliotted land of the Lake Traverse Reservation had been restored to the public domain and the Lake Traverse Reservation thereby disestablishd by the identical 1891 Act considered below. **In the Matter of the Application of Cheryl Spider DeCoteau, natural mother and next friend and on behalf of Robert Lee Feather and Herbert John Spider for a Writ of Habeas Corpus (Filed October 31, 1973,** S.D.) (The **DeCoteau** opinion appears at Appendix D.) Although **DeCoteau, supra,** arose under different factual circumstances, the basic issue therein was identical to the issue in the instant case.[1]

In **DeCoteau, supra,** the Supreme Court of the State of South Dakota was completely aware of the recent decisions of the Eighth Circuit Court of Appeals and this Court construing acts similar to the Act of March 3, 1891. In numerous instances it has cited and analyzed each and every important decision in this area of the law, including **Mattz,** v. **Arnett,** 93 S. Ct. 2245 (1973). For example, in 1972 the court felt compelled to hold that boundaries of the Standing Rock Res-

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1. The same basic argument presented in this petition is also presented in a Memorandum in Response to a Petition for a Writ of Certiorari filed in this Court in the DeCoteau case. Docket No. 73-1148.

ervation were unaffected by the passage of legislation similar to the legislation construed in **Seymour** v. **Superintendent,** 368 U.S. 351, because of the broad application recently given **Seymour** by the Eighth Circuit Court of Appeals. **State of South Dakota** v. **Molash,** 199 N.W. 2d 591 (S.D. 1972).

However, in **Decoteau, supra,** the court could not agree with the rationale of either the recent Eighth Circuit decisions or the two leading decisions from this Court. Therefore, it found that the lands affected by the 1891 Act were restored to the public domain and that the Lake Traverse Reservation had been effectively disestablished. If the conclusion of the South Dakota Supreme Court is considered correct in this respect, then the petitioners below are not entitled to the relief granted by the Eighth Circuit Court of Appeals. It is beyond question that any state is entitled to exercise criminal jurisdiction over the members of any tribe in those areas **not** within the limits of a reservation so long as the situs of crime is not included within the additional definitions of Indian Country set forth at 18 U.S.C. 1151(b) or 18 U.S.C. 1115(c); the petitioners below do not fall within either of these exceptions.

As recently as 1963, the Eighth Circuit Court of Appeals agreed with this analysis when the very same act considered below was before it in **DeMarrias** v. **State of South Dakota,** 319 F. 2d 845 (1936).[2] In **DeMarrias,** the Court of Appeals affirmed the trial court's "well reasoned" opinion and agreed that the Lake Traverse Reservation had been

2. The Act of March 3, 1891, has had a long prior history of judicial interpretation, none of which is consistent with the conclusion reached by the Court of Appeals below. **Application of DeMarrias,** 107 N.W. 2d 480 (S.D. 1958). **State v. DeMarrias,** 107 N.W. 2d 255 (S.D. 1961), cert. denied, 368 U.S. 844 (1961). **DeMarrias v. State of South Dakota,** 206 F. Supp. 549 (D.S.D. 1962), and the 1963 DeMarrias decision cited above in the text of the petition.

disestablished and that therefore the area in question "was not within Indian Country." **DeMarrias, supra,** at 847.

Now, in the opinion below, the Eighth Circuit Court of Appeals has expressely overruled the **DeMarrias** decision and held that the Lake Traverse Reservation was **not** disestablished by the 1891 Act, and for all practical purposes has thereby also overruled the State Supreme Court in **DeCoteau, supra.**

Since the decision below, the state has devoted considerably more time and effort to researching the question presented. This research, most of which unfortunately was not presented to either the Eighth Circuit Court of Appeals or the South Dakota Supreme Court, convinces your Petitioner that the decision of the latter court was correct in holding that Congress intended the 1891 Act to restore all the unallotted land to the public domain and thereby disestablish the Lake Traverse Reservation—and Congress, in **this** case, was acting in accordance with the wishes of the Indians.

The Indians wanted to sell their reservation[3] and the Department of the Interior instructed the Office of Indian Affairs to negotiate "for the relinquishment of such portions of the Lake Traverse Reservation" as the Indians wanted "to release." Letter from T. J. Morgan, Commissioner of Indian Affairs to the Negotiation Commission, August 13, 1889.

In **this** case, it was to be an agreement for "the cession or relinquishment of the reservation." Letter, supra, at 2,—

3. Gabriel Renville, who was the chosen leader on the Lake Traverse Reservation at the time, expressed the view that ". . . . We never thought to keep this reservation for our lifetime . . . . " Other similar remarks were expressed in terms of the benefits of the sale, " . . . We don't expect to keep reservation. We want to get the benefit of the sale . . . " National Archives File # 26163-1889, SC 147 Sisseton.

an agreement for the outright cession and sale of the reservation by the Indians to the Government restoring the land to the public domain, notwithstanding the statement in the opinion below that "the reservation here was not sold to the government outright but merely opened for settlement under the homestead laws . . . ."

Furthermore, immediately after the passage of the act. the Lake Traverse Reservation was removed, completely and unequiocally, from the official government maps and tables recording the then existing Indian Land areas and reservations in the United States. Consistent therewith, the unambiguous phrase "former Lake Traverse Reservation" begins to appear in the official communications of the Department of the Interior and Office of Indian Affairs, in addition to other miscellaneous congressional correspondence.

In this light, the fact that there was not any discussion of reservation boundaries in the documents examined by the Court of Appeals and therefore stressed in the opinion below as in some way indicating the continued existence of the Lake Traverse Reservation, becomes somewhat of an anomaly. Boundaries of a reservation which were to be disestablished would seem to this Petitioner to be somewhat unnecessary. Presumably, the government agreed.

In the event a writ is granted in this case, the above and additional material will be presented in detail to this Court in support of the conclusion reached by the South Dakota Supreme Court.

II. WITHIN THE PAST SIX MONTHS OTHER SUBSTANTIAL CONFLICTS HAVE BECOME APPARENT WITHIN THE EIGHTH CIRCUIT, AND BETWEEN THE EIGHTH CIRCUIT COURT OF APPEALS AND THE SOUTH DAKOTA SUPREME COURT.

The wholesale application of the **Seymour, supra,** and **Mattz, supra,** rationale by the Eighth Circuit Court of Appeals to each and every piece of reservation legislation that even resembles the acts construed therein has resulted in what the South Dakota Supreme Court has aptly termed "confusion." **Cook v. State of South Dakota,** (Filed March 15, 1974, S. D.)

This "confusion" can be best illustrated by a brief review of the decisions commencing with the opinion of the Eighth Circuit Court of Appeals in **The City of New Town, North Dakota** v. **United States,** 454 F.2d 121 (CA 8 1972). In **New Town,** the Court of Appeals held that the boundaries of the Fort Berthold Reservation were not diminished by legislation that had for over fifty years been considered to have diminished the reservation. The Court based its decision on the rationale of the **Seymour** case. Six months later, the South Dakota Supreme Court in construing similar legislation affecting a South Dakota reservation, reluctantly bowed to the Eighth Circuit Court of Appeals and overruled nearly fifty years of state case law in **State of South Dakota** v. **Molash** 199 N.W. 2d 591 (S.D. 1972) The concurring opinion of Chief Justice Biegelmier suggested that it might be "in the public interest" for the state Attorney General to file a petition for certiorari and Judge Doyle concurred in the suggestion. **Molash, supra,** at 594.

At approximately the same time, the Federal District Court for the District of South Dakota construing another "similar" piece of legislation, which was before it on remand by the Eighth Circuit Court of Appeals for further consideration of the issue in light of **New Town, supra,** held that the boundaries of the Cheyenne River Reservation were not diminished. **United States ex rel Condon v. Erickson,** 344 F Supp. 777 (D.S.D. 1972).

This decision touched off a debate in the South Dakota Law Review concerning the rather conspicuous absence, in the opinions and in the briefs, of any substantial citations to legislative history. 18 S. Dak. L Rev. 85 (1973). The debate however, was not in time to affect the Eighth Circuit Court of Appeals decision in **Condon**, holding that Cheyenne River Reservation was not diminshed even though the legislation being construed therein referred **on its face** to the area unaffected by the act remaining as "the diminished reservation." **United States ex rel Condon v. Erickson,** 478 F. 2d 684 (CA 8 1973). The court termed the decision a "close" question, **Condon, supra,** at 689.

Two months later, in **Mattz, supra**, this Court stressed the importance of legislative history and found that the legislation therein did not terminate or disestablish the Klamath River Reservation. In October, the South Dakota Supreme Court, while citing **Seymour, supra, Mattz, supra,** and the recent Eighth Circuit decisions, nevertheless found that a similar act **did** express a congressional determination to terminate and disestablish a portion of the Yankton Reservation. **State of South Dakota v. Williamson,** 221 N.W. 2d 182 (S.D. 1973). Later in that same month, the court again refused to apply the rationale of **Seymour, supra, Mattz, supra,** and the recent Eighth Circuit decisions to the act in the **DeCoteau** case.

However, in December, the Eighth Circuit Court of Appeals, overruling the Federal District Court and effectively overruling the **DeCoteau** case, held in the instant case that the Lake Traverse Reservation had not been disestablished by the 1891 Act. Again, it was the rationale of **Seymour, supra,** and **Mattz, supra,** and the broad application thereof in its own recent decisions that was the deciding factor in the Court of Appeals.

The conflicts and confusion in the above decisions resulted in an extensive review of legislative history by the parties and the court in **Rosebud Sioux Tribe v. Kneip et al,** —F Supp. (D.C.S.D., February 6, 1974). In a well written and extensively documented opinion, the Federal District Court for the District of South Dakota, Western Division, in the face of **Seymour, supra, Mattz, supra,** and the recent decisions of the Eighth Circuit, held that the Rosebud Reservation had in fact been diminished by a series of bills enacted over a six-year period. Page after page of congressional documents were quoted in the text of this excellent fifty page opinion. Immediately thereafter, the Supreme Court of South Dakota held that the Pine Ridge Reservation had also been diminished by a nearly "identical" act. **Cook, supra** at 5.

If the above acts were distinguishable, either on their face or in light of their legislative history, then the conflicts and confusion rampart in the above opinions would be, in part, justifiable. After all, Indian Law is a very complex and difficult area of the law. Realistically however, this simply is not the case. Someone, somewhere, must take the necessary time and action to clarify what is rapidly becoming something more than a mere conflict within the Eighth Circuit and between the Eighth Circuit Court of Appeals and the South Dakota Supreme Court.

III. THE IMPORTANCE OF THE ISSUE TO BE RESOLVED TO THE STATE OF SOUTH DAKOTA ALONE IS BEYOND QUESTION.

The wholesale application by the Eighth Circuit Court of Appeals of the **Seymour, supra,** and **Mattz, supra,** rationale to each and every piece of reservation legislation that even resembl[illegible] the acts construed therein has effectively overruled

not less than twenty-five state and federal cases decided over a period of fifty years—and this number includes only those cases concerned with South Dakota reservations.[4] In South Dakota alone, fourteen counties, in whole or in part, with a total population of approximately 50,000 individuals, have been or in all probability will be, engulfed by the boundaries of reservations heretofore held to have been diminished or extinguished.

It is because of the far-reaching effects of the question to be decided, in addition to the conflicts and confusion discussed at II, **supra,** that your Petitioner respectfully submits that the question presented should be authoritatively resolved by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiori should be granted.

Respectfully submitted,

KERMIT A. SANDE
Attorney General
State of South Dakota
Suite A. 304
Capitol Annex
Pierre, South Dakota 57501

JOHN J. SIMPSON
Box 147
Winner, South Dakota 57580

TOM D. TOBIN
422 Main Street
Winner, South Dakota 57580
Attorneys for Petitioner

4. Similar precedent in North Dakota and other states has also been cast aside.

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 73-1453 to 73-1459
and
Nos. 73-1541 to 73-1543

United States of America ex rel.
John Lee Feather,
Petitioner-Appellant,
v.
Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
LaVerne Black Thunder,
Petitioner-Appellant,
v.
Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
Ambrose St. John,
Petitioner-Appellant,
v.
Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
James L. Keeble,
Petitioner-Appellant,
v.
Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
Curtis Small,
Petitioner-Appellant,
v.
Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

Appeal from the United States District Court For the District of South Dakota.

United States of America ex rel.
Roman V. Derby
Petitioner-Appellant,

v.

Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
Joseph Day,
Petitioner-Appellant,

v.

Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
Arnold LaFramboise
Petitioner-Appellant,

v.

Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
Clarence Walker
Petitioner-Appellant,

v.

Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

United States of America ex rel.
Theodore Duane Wynde,
Petitioner-Appellant,

v.

Don R. Erickson, Warden
South Dakota State Penitentiary
Defendant-Appellee.

Submitted: October 18, 1973

Filed: December 7, 1973

Before HEANEY, ROSS and STEPHENSON, Circuit Judges

These consolidated habeas corpus appeals turn upon the issue of whether alleged criminal activity took place within "Indian Country." 18 U.S.C. § 1151. We hold that the alleged crimes were committed within the confines of the Sisseton-Wahpeton (Lake Traverse) Indian reservation and therefore the State of South Dakota was without jurisdiction to convict appellants who are all enrolled Indian of the Sisseton-Wahpeton Indian tribe. The district court orders denying the writs of habeas corpus must be reversed.

"[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States government, not withstanding the issuance of any patent * * * " is "Indian Country." 18 U.S.C. §1151. Any Indian who commits certain specified crimes within Indian Country is subject to the exclusive jurisdiction of the United States. 18 U.S.C. § 1153.

The individual appellants were all convicted of crimes by a South Dakota State district court and are now incarcerated at the South Dakota State Penitentiary. The facts of the respective cases are not here important. The parties agree that if the crimes were committed in Indian Country the federal district court had exclusive jurisdiction. Appellants seek release claiming they were wrongfully tried by the state court for offenses over which only the federal courts had jurisdiction.[1]

This court has previously had occasion to rule on the issue of whether the land within the original boundaries of the Lake Traverse reservation remains Indian country for 18 U.S.C. § 1151 purposes. **DeMarrias** v. **State of South Dakota**,

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[1]Two of the appellants claim tribal authority to deal with the crimes committed (forgery). 18 U.S.C. § 1152. Forgery is not one of the specified crimes within 18 U.S.C. § 1153.

319 F. 2d 845 (1963).[2] In **DeMarrias** this court adopted the trial court's opinion and determined that Congress had restored the reservation land to the public domain and thereby removed it from the category of Indian country. See **DeMarrias, supra,** affirming 206 F. Supp. 549 (D.S.D. 1962). For reasons that will become evident we find it necessary to depart from tne holding in **DeMarrias.**

The Lake Traverse reservation was established by treaty between the United States and the Sisseton-Wahpeton Sioux Indians in 1867. 15 Stat. 505. The reservation was said by Congress to be "permanent." 15 Stat. 505, 506 (Art. III).

Following the pattern as established in the General Allotmen Act of February 8, 1887[3] the "surplus" land within the Lake Traverse reservation was opened to non-Indian settlers after allotments were made to individual members of the Sisseton-Wahpeton tribe. Act of March 3, 1891. 26 Stat. 989, 1036. The area opened for settlement by the 1891 Act included all of the reservation that had not been previously allotted to tribe members.[4] The essential provisions of the 1891 Act reflect the agreement reached between the government and the Indians on December 12, 1889 whereby the Indians agreed to "cede, sell relinquish, and convey" the

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[2]The case had a long prior history before reaching our court. **State v. DeMarrias,** 107 N.W. 2d 255 (S.D. 1961), cert. denied, 368 U.S. 844 (1961); **DeMarrias v. State of South Dakota,** 206 F. Supp. 549 (D.S.D. 1962). See also **Application of DeMarrias,** 91 N.W. 2d 480 (S.D. 1958).

[3]24 Stat. 388. For an excellent general discussion of the General Allotment Act see **Mattz v. Arnett,** —U.S.—, 93 S. Ct. 2245, 2253-2254; F. Cohen, **Handbook of Federal Indian Law** (1942) at 78-79, 207-217.

[4]The 1891 Act also made provision for some additional allotments to the Sisseton-Wahpeton tribe as reparations for their loyal service to the country during the 1862 Sioux uprising. 26 Stat. 989, 1037, 1039. See also the preamble to the original treaty of 1867. 15 Stat. 505; S. Ex. Doc. No. 66, 51st Cong., 1st Sess. (189) at I.

surplus lands to the United States. 26 Stat. 1036 (Art. I). In turn, the lands were opened for settlement:

> * * * the lands by said agreement ceded, sold, relinquished and conveyed to the United States shall immediately, * * * be subject only to entry and settlement under the homestead and townsite laws of the United States * * *. 26 Stat. 1039 (§ 30).

President Benjamin Harrison formally proclaimed the lands opened for settlement. 27 Stat. 1017.

We must answer this question: Did the 1891 Act either on its face, or alternatively, when considered with the contemporaneous and subsequent legislative history, manifest Congressional intent to diminish the Lake Traverse reservation boundaries?

We have these guidelines: (1) Intent to abrogate treaty rights is not lightly imputed to Congress. **Menominee Tribe of Indians v. United States,** 391 U.S. 404, 413 (1968); (2) Congress having once established a reservation, all tracts remain a part of that reservation until separated therefrom by Congress. **United States v. Celestine,** 215 U.S. 278, 285 (1909); **Seymour v. Superintendent,** 368 U.S. 351, 359 (1962). Indeed, Congressional intent to disestablish the reservation must be either expressed on the face of the Act or be clearly discernible from the "surrounding circumstances and legislative history." **Mattz, v. Arnett,** —U.S.—, 93 S. Ct. 2245, 2258 (1973); **United States ex rel. Condon v. Erickson,** 478 F. 2d 684, 689 (CA8 1973); (3) Opening an Indian reservation for settlement by homesteading is not necessarily inconsistent with its continued existence as a reservation. **Seymour, supra. See also Condon, supra; The City of New Town, North Dakota v. United States,** 454 F.2d 121, 125 (CA8 1972); (4) The well-preserved general rule is that Indians are to be

left free from state jurisdiction and control. **McClanahan v. State Tax Commission of Arizona**, —U.S.—, 93 S. Ct. 1257 (1973); **Condon, supra** at 689 and citations. Federal jurisdiction is preferred. **McClanahan, supra.**

The case before us is not unlike **Seymour, Mattz** and **Condon.** The overall climate of legislative activity concerning Indian reservations during the period from 1887 through 1910 received its primary impetus from the General Allotment Act. See **Cohen, supra** at 78-80 (§§ 11-13). The 1891 Act, by its express terms, refers to the General Allotment Act of 1887. Just as in the beforementioned three cases, the reservation here was not sold to the government outright but merely opened for settlement under the homestead laws and the 1887 general allotment plan. Allotment and homesteading do not suggest congressional purpose to terminate the reservation. **Seymour, supra.**

Appellee leans upon a phrase extracted from section 30 of the 1891 Act.[5] The phrase ", and be subject to the laws of the state wherein located" is read by appellee to confer state jurisdiction upon the entire portion of land opened to homesteading. Appellant argues a misplaced comma and contends that only school lands, sections sixteen and thirty-six, are subject to state jurisdicition. Appellant's argument is more plausible in light of the general pattern adopted by Congress in making specific grants of these numbered sections in each township to the states. **See, e.g.,** 33 Stat. 319, 323; 35 Stat. 458, 459; 35 Stat. 460, 461; **Condon, supra** at 687 n. 5

[5]The relevant portion of section 30 states: "That the lands by said agreement ceded, sold, relinquished and conveyed to the United States shall immediately, * * * be subject only to entry and settlement under the homstead and townsite laws of the United States, excepting the sixteenth and thirty sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the state wherein located * * *." 26 Stat. 1039 (§ 30) (emphasis supplied.)

(specifcally granting said sections to the states) and 28 Stat. 314, 319; 28 Stat. 326, 332; 31 Stat. 672, 676 (using the same language as the instant statute but no comma placed before the "and" of the "subject to state law" clause). We do not read this clause as a clear indication of congressional intention to terminate the Lake Traverse reservation. **Seymour, Mattz, Condon,** all **supra.**

The **Mattz** case makes clear that Congress, during the legislative years surrounding the 1891 Act "was fully aware of the means by which termination could be effected." **Mattz, supra** at 2258 & n. 22. Clear language such as that discussed in **Mattz,** expressing intent to discontinue the Lake Traverse reservation is nowhere to be found in the 1891 Act here involved.

Nothing that can be gleaned from the legislative history or subsequent legislative enactments can be fairly said to shed any further light upon the intent of the Congress regarding the reservation boundaries. The Committee reports on the 1891 Act[6] and reports on similar bills that were not enacted[7] do not discuss the proposed boundaries. The only direct reference to the boundaries of the reservation subsequent to the 1891 Act came from President Harrison in his proclamation opening the lands "within the Lake Traverse Reservation" to settlement. (emphasis supplied) 27 Stat. 1017. This reference is by no means conclusive.

Unlike the subsequent legislative treatment in **New Town** the later congressional enactments here are not "admittedly inconsistent and confusing." **New Town, supra** at 125. **Accord, Condon, supra** at 688; **Seymour, supra** at 427 n. 12.

[6]H. Rept. No. 2325, 51st Cong. 1st Sess. (1890); S. Rept. No. 1510, 51st Cong. 1st Sess. (1890).

[7]E.g., S. Rept. No. 661, 51st Cong. 1st Sess. (1890); H. Rept. No. 2271, 51st Cong. 1st Sess. (1890); S. Ex. Doc. No. 66, 51st Cong. 1st Sess. (1890).

Unlike **Mattz** we have here no evidence that "the House was generally hostile to continued reservation status of the land in question." **Mattz, supra** at 2255. Those decisions on closer facutal situations found the reservations not to have been diminished.

We must view as significant the fact that our search of the legislative documents subsequent to the 1891 Act unearths no telltale language as to the lawmaker's will concerning the boundaries of the Lake Traverse reservation. The significance lies, of course, in the test to be applied. That is, congressional expression or clear implication diminishing the reservation boundaries.

Finally, we think it noteworthy that the South Dakota Supreme Court, while interpreting an Act similar to the Act inissue here, has recognized the principles established in **Seymour** and **New Town** and denied state jurisdiction in an analogous situation. **State v. Molash,** 199 N. W. 2d 591 (1972).

Congress established the Lake Traverse reservation as a "permanent" reservation in 1867. Since that time Congress has not through clear expression or by innuendo shown an intention to disestablish.

The result we reach today is, of course, contrary to the result we reached in 1963. **DeMarrias, supra.** The more recent teachings of the United States Supreme Court and of this Court, set out above, have been premised upon legislative enactments and history analogous in all material respects to the instant case. To reach a different result in this case would be, we think, to ignore the clear impact of the decisions discussed above. We therefore now hold that the body of legislative documents concerning the Lake Traverse Indian reservation does not, against the glare of **Seymour**

and the more recent judicial guidance in **Mattz, Condon** and **New Town,** demonstrate congressional inattention to disestablish the reservation.

The boundaries of the Lake Traverse Indian reservation remain as they were established in 1867. The scene of the alleged crimes is, therefore, within Indian country. South Dakota had no jurisdiction to try appellants. The writs of habeas corpus should have been granted.

Reversed and remanded for proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of John Lee Feather — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of LaVerne Blackthunder — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Ambrose St. John — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of James R. Keeble — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Curtis Small — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Roman V. Derby — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Joseph Day — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Arnold LaFramboise — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 10th day of July, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Clarence Walker — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 10th day of July, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Theodore Duane Wynde — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 10th day of July, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

APPENDIX C

Treaty of February 19, 1867

Article 3

For and in consideration of the cession above mentioned, and in consideration of the faithful and important services said to have been rendered by the friendly bands of Sissitons and Warpetons Sioux here represented, and also in consideration of the confiscation of all their annuities, reservations, and improvements, it is agreed that there shall be set apart for the members of said bands who have heretofore surrendered to the authorities of the Government, and were not sent to the Crow Creek reservation, and for the members of said bands who were released from prison in 1866, the following-described lands as a permanent reservation, viz:

Beginning at the head of Lake Travers(e), and thence along the treaty line of the treaty of 1851 to Kampeska Lake; thence in a direct line to Reipan or the northeast point of the Coteau des Prairie(s), and thence passing north of Skunk Lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty-line of 1851 to the place of beginning.

Article 10

The chiefs and head-men located upon either of the reservations set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: Provided, That all rules, regulations, or laws adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent.

Act of March 3, 1891, 26 Stat. 1035

Sec. 26. That the following agreement entered into on behalf of the United States by Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, commissioners on the part of the United States, on the twelfth day of December, eighteen hundred and eighty-nine, wiht the Sisseton and Wahpeton bands of Dakota or Sioux Indians now on file in the Department of the Interior, signed by said commissioners for the United States, and for said Indians by Simon Ananangmari and others, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

"Whereas, by section five of the act of Congress entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the Laws of the United States and Territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, it is provided 'That at any time after lands have been allotted to all the Indian of any tribe, as herein provided, or sooner,' if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of such portions of its reservations not allotted as such tribe purchase and release by the said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservations not alloted as such tribe shall from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress; and the form

and manner of executing such release shall also be prescribed by Congress.

Whereas the Sisseton and Wahpeton bands of Dakota or Sioux Indians are desirous of disposing of a portion of the land set apart and reserved to them by the third article of the treaty of February nineteenth, eighteen hundred and sixty-seven, between them and the United States, and situated partly in the State of North Dakota and partly in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the Act of Congress aproved February eighth, eighteen hundred and eighty-seven, aforesaid, at the Sisseton Agency South Dakota, on this the twelfth day of December, eighteen hundred and eighty-nine, by and between Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, on the part of the United States, duly authorized and empowered thereto, and the chiefs, head-men and male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, witnesseth:

ARTICLE I.

The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right title and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates

and agrees to pay to the Sesseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the sum of two dollars and fifty cents per acre for each and every acre thereof, and it is agreed by the parties hereto that the sum so to be paid shall be held in the Treasury of the United States for the sole use and benefit of the said bands of Indians; and the same, with interest thereon at three per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of the said bands of Indians, or members thereof, as provided in section five of an act of Congress, approved February eighth, eighteen hundred and eighty-seven, and entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes:" **Provided,** That any religious society or other organization now occupying, under proper authority, for religious or educational work among the Indians, any of the land in this agreement ceded, sold, relinquished, and conveyed shall have the right, for two years from the date of the ratification of this instrument, within which to purchase the lands so occupied at a price to be fixed by the Congress of the United States: **Provided further,** That the cession sale, relinquishment, and conveyance of the lands described in article one of this agreement shall not take effect and be in force until the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, shall have been paid to said bands of Indians, as set forth and stipulated in article third of this agreement.

ARTICLE III

The United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people, when at war with the United States, and their families and descendants, under the provisions of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, and of which they have been wrongfully and unjustly deprived by the operation of the provisions of an act of Congress approved February sixteenth, eighteen hundred and sixty-three, and entitled "An act for the relief of persons for damages sustained by reason of depredation, and injuries by certain bands of Sioux Indians"; said sum being at the rate of eighteen thousand four hundred dollars per annum from July first, eighteen hundred and sixty-two, to July first, eighteen hundred and eighty eight less their pro rata share of the sum of six hundred and sixteen thousand and eighty-six dollars and fifty-two cents, heretofore appropriated for the benefit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians, as set forth in report numbered nineteen hundred and fifty-three, of the House of Representatives, Fiftieth Congress, first session.

The United States further agrees to pay to said bands of Indians, per capita, the sum of eighteen thousand and four hundred dollars annually from the first day of July, eighteen hundred and eighty-eight, to the first day of July, nineteen hundred and one, the latter date being the period at which the annuities to said bands of Indians were to cease, under the terms of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, afore-

said; and it is hereby further stipulated and agreed that the aforesaid sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, due the first day of July, eighteen hundred and eighty-nine, shall become immediately available upon the ratification of this agreement.

ARTICLE IV.

It is further stipulated and agreed that there shall be allotted to each individual member of the bands of Indians, parties hereto, a sufficient quantity, which, with the lands heretofore allotted, shall make in each case one hundred and sixty acres, and in case no allotment has been made to any individual member of said bands, then an allotment of one hundred and sixty acres shall be made to such individual, the object of this article being to equalize the allotments among the members of said bands, so that each individual, including married women, shall have one hundred and sixty acres of land; and patents shall issue for the lands allotted in pursuance of the provisions of this article, upon the same terms and conditions and limitations as is provided in section five of the act of Congress, approved February eighth, eighteen hundred and eighty-seven, hereinbefore referred to.

ARTICLE V.

The agreement concluded with the said Sisseton and Wahpeton bands of Dakota or Sioux Indians, on the eighth day of December, eighteen hundred and eighty-four, granting a right of way through their reservation for the Chicago, Milwaukee Saint Paul Railway, is hereby accepted, ratified and confirmed.

ARTICLE VI.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof we have hereunto set our hands and seals the day and year above written.

Eliphalet Whittlesey,
D. W. Diggs,
Chas. A. Maxwell,
On the part of the United States.

The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned, being male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, do hereby consent and agree to all the stipulations, conditions, and provisions therein contained.

Simon Ananangmari (his x mark), and others

Sec. 27. That for the purpose of carrying out the terms and provisions of said agreement there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated the sum of two million two hundred and three thousand dollars, of which amount the sum of five hundred and three thousand two hundred dollars shall be immediately available, and the same, or so much thereof as may be necessary, shall be paid as follows, to wit: To the Sisseton and Wahpeton Indians, parties to this agreement, the sum of three hundred and seventy-six thousand five hundred and seventy-eight dollars and thirty-seven cents, said amount to be distributed per capita. To the scouts and soldiers of the Sisseton, Wahpeton, Medawakanton, and Wapakoota bands of Sioux Indians, who were enrolled and entered into the militar service of the United States and served in suppressing what is known as the

"Sioux outbreak of eighteen hundred and sixty-two:" or those who were enrolled and served in the armies of the United States in the war of the rebellion, and to the members of their families and descendents, now living, of such scouts and soldiers as are dead, who are not included in the foregoing class, as parties to said agreement, the sum of one hundred and twenty-six thousand six hundred and twenty dollars, said amount to be distributed per capita; and the said sum of five hundred and three thousand and two hundred dollars or so much thereof as may be necessary, when paid to the said Sisseton, Wahpeton, Medowakanton, and Wahpakoota bands of Sioux Indians, their families and descendants, designated in this act, shall be deemed a full settlement of all claims they may have for unpaid annuities, under any and all treaties or acts of Congress up to the thirtieth day of June, eighteen hundred and ninety; **Provided however,** That all contracts or agreements between said Indians or any of them, and agents, attorneys, or other persons for the payment of any part of this appropriation for or on account of fees or compensation to said agents, attorneys or other persons, unless the same have been made, as provided by law, and are yet in force and have been approved by the Department of the Interior, or have been made by and between citizens of the United States are hereby declared null and void, and in such cases the Secretary of the Interior shall cause all moneys herein appropriated to be paid directly to the said Indians and shall pay no portion of the same, to their said agents or attorneys. And in no event shall a sum exceeding ten per cent be paid to any agent or attorney, and the balance, after deducting the said five hundred and three thousand two hundred dollars, to wit, the sum of one million six hundred and ninety-nine thousand eight hundred dollars, or so much thereof as may be necessary, to pay for lands by said agreement ceded, sold, relinquished, and conveyed at the rate of two dollars and fift cents per acre, shall be

placed in the Treasury of the United States, to the credit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians (parties to said agreement), and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress or to application by order of the President for the education and civilization of said bands of Indians or members thereof.

Sec. 28. That any religious society or other organization now occupying under proper authority any of the lands by said agreement ceded, sold, relinquished, and conveyed shall have the right for a period of two years from the date hereof, within which to purchase the lands so occupied not exceeding one hundred and sixty acres in any one tract at the price paid therefor by the United States under said agreement.

Sec. 29. That in order to further carry out the provisions of said agreement and of this act, the Secretary of the Interior is authorized and directed, as soon as practicable, to cause the additional allotment provided for in said agreement to be made in the manner and form as provided in an act entitled "An act to provide for the allotments of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes," and as provided in any existing amendments of said act, approved February eighth, eighteen hundred and eighty-seven, and to pay the sums hereinbefore made immediately available, first to the parties to said agreement, or their proper representatives, and to appoint suitable officers for such purposes who shall furnish bonds usual in such cases, and whose compensation and expenses shall be paid out of said available funds as the Secretary of the Interior shall direct, and whose lawful acts, when approved by him, shall be final and conclusive.

Sec. 30. That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located; **Provided,** That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same.

18 U.S.C. 1151 (62 Stat. 757, as amended by 63 Stat. 94)

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian county", as used in this chapter, means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-ways running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

APPENDIX D

#11200-a-JUD

IN THE

SUPREME COURT OF THE

STATE OF SOUTH DAKOTA

In the Matter of the Application of CHERYL SPIDER DECOTEAU, natural mother and next friend and on behalf of ROBERT LEE FEATHER and HERBERT JOHN SPIDER for a Writ of Habeas Corpus,

Petitioner and Appellant,,

v.

The District County Court for the Tenth Judicial District,

Defendant and Respondent

Appeal from the Circuit Court of Roberts County, South Dakota

---

HON. PHILO HALL, Judge

DOYLE, Justice.

This is an appeal from the judgment of the Circuit Court of Roberts County denying appellant's petition for a writ of Habeas Corpus to release her two children from the custodial process of the district county court.

The essential facts are undisputed. Appellant, Cheryl Spider DeCoteau, is the mother of Robert Lee Feather and Herbert John Spider. All are members of the Sisseton-Wahpeton Sioux Tribe. The youngest child, Robert, was

given up for adoption by his mother on March 12, 1971. The older child was placed in a foster home by the county court after neglect and dependency proceedings were initiated by the Welfare Department. Both children are in foster home care at present by order of the county court of August 4, 1972.

It was stipulated by the parties that approximately fifty per cent of the acts or omissions giving rise to the county court orders occurred on federal trust lands, and approximately fifty per cent of said acts or omissions occurred on non-Indian patented lands, all within the exterior boundaries of the Lake Traverse Reservation, as originally established by the Treaty of February 19, 1867. 15 Stat. 505.

The appellant's petition for a Writ of Habeas Corpus challenged the jurisdiction of the state court. Whether the state court had jurisdiction depnds on whether the non-Indian patened lands, where a portion of the acts or omissions occurred, are within "Indian Country".

In 1948 Congress enacted a statutory definition of what constitutes "Indian Country":

> "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the orginal or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have

not been extinguished, including rights-of-way running through the same." Act of June 25, 1948, c. 645, 62 Stat. 757, as amended 18 U.S.C.A. § 1151 (1970).

If the non-Indian patented lands (situs) involved in the present case are within this definition of "Indian Country" then the state courts of South Dakota have no jurisdiction, for the law is established that state jurisdiction does not extend to Indians in "Indian Country". Williams v. Lee, 1959, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251; State of Arizona ex rel. Merrill v. Turtle, 1969, 9 Cir., 413 F.2d 683; Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., 1956, 8 Cir. 231 F.2d 89; United States ex rel. Condon v. Erickson, D.C.S.D., 344 F. Supp. 777; Smith v. Temple, 82 S.D. 650, 152 N.W2d 547; State v. Molash, 1972, S.D., 199 N.W.2d 591.

Numerous cases regarding state jurisdiction over Indians have been before this court and we have consistently held that if the reservation is disestablished by Congressional action and the situs of the act or crime is located on the portion of the reservation so dissolved, then the state courts have jurisdiction. Application of DeMarrias, 1958, 77 S.D. 294, 91 N.W.2d 480; State v. DeMarrias, 1961, 79 S.D. 1, 107 N.W.2d 255, cert. den., 368 U.S. 844, 82 S.Ct. 72 7 L.Ed.2d 42; DeMarrias v. State of South Dakota, 1962, D.C.S.D., 206 F. Supp. 549; DeMarrias v. State of South Dakota, 1963, 8 Cir., 319 F.2d 845; State ex rel. Hollow Horn Bear v. Jameson, 1959, 77 S.D. 527, 95 N.W.2d 181; Wood v. Jameson, 1964, 81 S.D. 12, 130 N.W.2d 95.

In order to determine whether the non-Indian patented lands (situs) are in "Indian Country", it is necessary to review the history of the "Lake Traverse Reservation", now

commonly known as the "Sisseton-Wahpeton Indian Reservation", and all applicable legislation pertaining thereto.

In 1867, the United States, by treaty, set aside a permanent reservation for the Sisseton and Wahpeton Bands. Treaty of February 19, 1867, 15 Stat. 505, ratified April 15, 1867, Proclamation May 2, 1867:

> "Beginning at the head of Lake Travers[e], and thence along the treaty line of the treaty of 1851 to Kampeska lake; thence in a direct line to Reipan or the northeast point of the Coteau des Prairie[s], and thence passing north of Skunk lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty line of 1851 to the place of beginning."

On December 12, 1889, an "Agreement" was entered into between the United States Government and the Sisseton and Wahpeton Bands of the Dakota or Sioux Indians, Act of March 3, 1891, 26 Stat. 989 at 1036, whereby the Indians:

> "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made."

This agreement further provided that the United States would pay to the Sisseton and Wahpeton Bands of Indians the sum of two dollars and fifty cents per acre for every acre thus ceded, sold, relinquished, and conveyed to the United States. It was agreed by the parties that this sum

of money, with interest to accrue, would be held in the Treasury of the United States for the sole use and benefit of the Indians.

By the very terms of this agreement, the Sisseton and Wahpeton Bands of Indians sold their unallotted lands, and the United States Government paid a sum certain for each and every acre purchased. The money was deposited in the United States Treasury and the United States agreed to pay interest thereon. All the money was to be used for the sole benefit of the Indians. This, then, was an outright cession and sale of lands by the Indians to the United States. The land sold was separated from the reservation by Congress and became part of the public domain.[1] In this agreement the United States did not contract to act as trustee to sell the land for the Indians and credit the proceeds to the tribe. The government agreed to purchase the land outright. Therefore, the tribal title was extinguished and the reservation disestablished. The unallotted lands so sold are no longer in "Indian Country".

Appellant contends that the purpose of the Act of 1891 was to make surplus lands available to settlers. There was nothing stated in the original Agreement of 1889 about settlers purchasing or moving to the unallotted land bought by the United States Government. The Act of 1891, ratifying the Agreement of 1889, contained a section pertaining to settlers. Section 30 states:

---

[1]South Dakota was admitted into the Union as a State on the express condition that its people do "agree and declare that they forever disclaim all right and title to * * * all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *." Enabling Act of February 22, 1889, 25 Stat. 676, Vol. 1, SDCL p. 183, Art. XXII of our Constitution.

> "That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth section of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *."

The Act of 1891, including this section, has been construed to mean that the lands so ceded and sold would be subject to the laws of the State of South Dakota. Application of DeMarrias, supra. In DeMarrias v. State of South Dakota, 1962, D.C.S.D., 206 F. Supp. 549, the court stated:

> "The said Acts of 1889 and 1891 and the President's Proclamation, supra, constitute explicit manifestations as of the effective dates thereof of an intent by the Congress to restore to the public domain all unallotted lands within the Lake Traverse Reservation which were being opened for entry and settlement under the homestead and townsite laws of the United States and to make those areas subject to the laws of South Dakota."

On appeal the Eighth Circuit, United States Court of Appeals, approved the United States District Court's "carefully considered opinion" and affirmed "the trial court's well-reasoned opinion". DeMarrias v. State of South Dakota, 1963, 8 Cir., 319 F.2d 845. We agree with these cases. Since the lands had been sold to the United States by the Indians,

the United States Government could provide the terms by which this land would be settled and sold, and also provide what jurisdiction would be established for these lands.

Appellant contends that the reasoning in the cases of Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346, and City of New Town, North Dakota v. United States, 1972, 8 Cir., 454 F.2d 121, should apply to the case before this court. In our opinion these cases do not apply as they interpret a completely different type of Act than the Act of 1891 herein involved, which is a sale and cession Act of Congress disestablishing a portion of the Sisseton and Wahpeton Reservation.

Where the language of a statute is plain and unambiguous, there is no occasion for construction. Phelps v. Life Benefit, Inc., 67 S.D. 276, 291 N.W. 919; see generally, 50 Am. Jur., Statutes, §225.

We conclude that the Act of 1891 disestablished that part of the Sisseton and Wahpeton Indian Reservation embracing the non-Indian patented land and that the trial court correctly found that the district county court had jurisdiction over the appellant for the acts or omissions that occurred in "non-Indian Country".

Affirmed.

All the Justices concur.

Supreme Court, U. S.
JUL 29 1974
JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent,
United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent,
United States of America ex rel.
AMBROSE ST. JOHN, Respondent,
United States of America ex rel.
JAMES R. KEEBLE, Respondent,
United States of America ex rel.
CURTIS SMALL, Respondent,
United States of America ex rel.
ROMAN V. DERBY, Respondent,
United States of America ex rel.
JOSEPH DAY, Respondent,
United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent,
United States of America ex rel.
CLARENCE WALKER, Respondent,
United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 8, 1974
CERTIORARI GRANTED JUNE 3, 1974

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	FIFTH
COUNTY OF ROBERTS	)	JUDICIAL CIRCUIT

John Lee Feather,
Petitioner

vs

The State of South Dakota,
Respondent

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

There having been filed in this Court by John Lee Feather, the petitioner, a Petition for a post-conviction hearing and the States Attorney having duly answered as provided by law; the above entitled matter come on for hearing before the Court in the Courtroom, in the Courthouse, in the City of Sisseton, County of Roberts and State of South Dakota, on the 26th day of September, 1972; the petitioner appearing by his Attorney, L. R. Gustafson, and the State of South Dakota appearing by Wallace R. Brantseg, States Attorney of Roberts County, South Dakota; and the Court having heard and considered all of the evidence introduced by said petitioner and no evidence having been offered by the Respondent; and the Court being fully apprised in the premises, now makes and enters the following:

FINDINGS OF FACT

I

That the petitioner, John Lee Feather, is an unemancipated American Indian, being enrolled as a member of the Sisseton-Wahpeton Sioux Tribe.

II

That he is presently a prisoner, incarcerated in the State Penitentiary at Sioux Falls, under a Six (6) year sentence imposed on December 9, 1971, by the Honorable Sigurd, Anderson, Judge of the Circuit Court of the Fifth Judicial

Circuit of South Dakota, on a plea of guilty at Sisseton, Roberts County, South Dakota, to the charge of First Degree Robbery.

III

That the robbery was committed within the County of Roberts, State of South Dakota, within the exterior boundaries of the Sisseton-Wahpeton Reservation. That the particular land upon which the alleged crime was committed was not Indian trust land but was land that had been deeded to a non-Indian, still within the limits of the reservation.

IV

That the land upon which the robbery was committed was non-Indian, patented land, which the Sisseton-Wahpeton bands of the Dakota Sioux Indians had sold or relinquished to the United States under the terms of the agreement which was ratified by Congress in 1891.

V

That in sections surrounding this particular land upon which the robbery was committed there is land that remains unpatented Indian Land or Indian trust land within the Sisseton-Wahpeton Sioux Lake Traverse Reservation.

VI

That lots or tracts of non-Indian patented or deeded land and lots and tracts of unpatented Indian trust land are interspersed in a crazy-quilt pattern over the entire area within the boundaries of the said Reservation as by Treaty defined in 1867.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

I

That the State Court had jurisdiction of the petitioner for this patented land was not within Indian country.

Let Judgment be entered accordingly.

Dated this 26th day of September, 1972.

BY THE COURT

ATTEST

Philo Hall
Judge of Circuit Court

(SEAL) Vivian Hove
Clerk

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF ROBERTS)

IN CIRCUIT COURT
FIFTH
JUDICIAL CIRCUIT

John Lee Feather,
Petitioner
vs
The State of South Dakota,
Respondent

JUDGMENT

The Petition of the above named petitioner having come on for hearing before the Court, in the Courtroom, in the Courthouse, in the City of Sisseton, County of Roberts and State of South Dakota, on the 26th day of September, 1972 before Honorable Philo Hall, Judge presiding, and the officers of the Court present; the petitioner appearing by his Attorney L. R. Gustafson, of Britton, South Dakota, and the Respondent appearing by Wallace R. Brantseg, the States Attorney in and for Roberts County, of Sisseton, South Dakota; the Court having heard and considered the Petitioner's Petition and being duly apprised in the premises, and having entered its Findings of Fact and Conclusions of Law, which are incorporated herein by reference thereto as if the same were herein re-stated, and being fully apprised in the premises, it is now therefore

ORDERED that the Petition of John Lee Feather be and the same is hereby denied.

Dated this 26th day of September, 1972.

BY THE COURT

ATTEST

Philo Hall
Judge of Circuit Court

(SEAL) Vivian Hove
Clerk

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF ROBERTS)

IN CIRCUIT COURT
FIFTH
JUDICIAL CIRCUIT

John Lee Feather,
Petitioner
vs
The State of South Dakota,
Respondent

DENIAL OF APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE FOR APPEAL

A final judgment having been entered by the undersigned Circuit Judge, denying petitioner's petition for relief under Chapter 23-52 of South Dakota Compiled Laws 1967, and application having been made for a certificate of probable cause, as provided in Section 23-52-16 South Dakota Compiled Laws 1967 as amended, and it appearing to the satisfaction of this Court that the sole issue involved has been decided by the United States Court of Appeals for the Eighth Circuit in the case of DeMarrias v. State of South Dakota, (319 F2d 845) (1963), based on interpretation of federal statutes and proclamations, United States treaties with the Sisseton-Wahpeton Bands of Sioux Indians and the intent of United States Congress, and there is not probable cause that an appealable issue exists for appeal to the South Dakota Supreme Court, the application for a certificate of probable cause, required for appeal to the Supreme Court of South Dakota under the terms of Section 23-52-16 South Dakota Compiled Laws 1967, is denied.

Dated this 27th day of September, 1972.

BY THE COURT

ATTEST

Philo Hall
Judge of Circuit Court

(SEAL) Vivian Hove
Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

John Lee Feather, Petitioner	)	ORDER DENYING CERTIFICATE OF PROBABLE CAUSE FOR APPEAL
vs.	)	
The State of South Dakota, Respondent	)	

Petitioner's application for a certificate of probable cause to appeal from a final judgment in the above entitled matter entered by the Honorable Philo Hall, one of the Judges of the Fifth Judicial Circuit of the State of South Dakota on September 27, 1972, in Roberts County, South Dakota, having been fully considered by all members of the Court and no probable cause that an appealable issue exists having been shown to the satisfaction of the Court.

IT IS ORDERED that Petitioner's application for a certificate of probable cause be and the same is hereby denied.

DATED at Pierre, South Dakota, this 20th day of October, 1972.

BY THE COURT:

Charles S. Hanson
Presiding Judge

ATTEST:

Lyman A. Melby Seal),
Clerk of the Supreme Court

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FILED
November 20, 1972
William J. Srstka,
Clerk
By Judy L. Harvey,
Deputy

United States of America ex rel
John Lee Feather,
Plaintiff

vs

Don R. Erickson, Warden of the
South Dakota State Penitentiary,
Defendant

CIV 72-1030
PETITION

TO THE HONORABLE AXEL J. BECK, OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, NORTHERN DIVISION:

I

That your petitioner is now imprisoned and restrained of his liberty in the South Dakota State Penitentiary in the City of Sioux Falls, County of Minnehaha and State of South Dakota, in the custody of Don R. Erickson, Warden of said Penitentiary; that the said prison is a state prison of the State of South Dakota under the jurisdiction of the State of South Dakota and its officers.

II

That the cause or pretense of such imprisonment or restraint is that your petitioner on or about the 9th day of

December, 1971, was sentenced by the Honorable Sigurd Anderson, Judge presiding of the Fifth Judicial Circuit of Roberts County, South Dakota, for the crime of First Degree Robbery.

III

That the alleged crime was committed within the exterior boundaries of the Sisseton-Wahpeton Indian Reservation as was set apart for the tribe as a permanent reservation under the Treaty with the Sisseton-Wahpeton Bands of the Sioux Indians in 1867.

IV

That the land upon which the alleged crime was committed, which is one of the enumerated crimes pursuant to 18 U.S.C.A. 1153, was not Indian trust land that had been deeded to a non-Indian; that the land was still within the exterior boundaries of the Sisseton-Wahpeton Indian Reservation and within Indian country as defined by 18 U.S.C.A. 1151.

V

That your petitioner is an unemancipated American Indian, enrolled as a member of the Sisseton-Wahpeton Sioux Tribe.

VI

That your petitioner was sentenced by the Circuit Court Judge of Roberts County, South Dakota, for the alleged violation of a State offense for Six (6) years in the State Penitentiary and is presently serving the term as imposed.

VII

That the State of South Dakota had no jurisdiction over the Defendant, he being an Indian, where the alleged crime was committed within the Sisseton-Wahpeton Indian Reservation, even if the particular land had been deeded to a non-Indian prior to the alleged offense having been committed.

VIII

That the ground where the alleged offense was committed is within Indian country as defined by 18 U.S.C.A. 1151, and that the State had no jurisdiction of the petitioner thereon.

IX

That there was filed a Petition for Post-Conviction Hearing by the petitioner herein with the Circuit Court of Roberts County, South Dakota, and a hearing was had thereon on the 26th day of September, 1972, the Honorable Philo Hall, Judge presiding, and attached hereto is a copy of the Findings of Fact and Conclusions of Law dated the 26th day of September, 1972, together with a copy of the Judgment on the 26th day of September, and a copy of the Denial of Application for Certificate of Probable Cause for Appeal dated the 27th day of September, 1972, by Judge Hall.

X

Also attached hereto is a copy of the Order Denying Certificate of Probable Cause for Appeal as denied by all of the members of the South Dakota Supreme Court, signed by the presiding Judge, and dated the 20th day of October, 1972.

XI

That your petitioner has exhausted all of the state remedies at this time to the State of South Dakota and to all the Courts therein.

XII

That your petitioner being an enrolled member of the

Sisseton Sioux Tribe states that he is without funds, that he is indigent and unable to pay fees for the services of an attorney to represent him in the matters which he wishes to bring before this Court or pay for the filing of this writ.

XIII

That L. R. Gustafson, an Attorney at Law, of Britton, South Dakota, has represented your petitioner in the Post-Conviction hearings had in Roberts County, South Dakota.

XIV

That no previous application has been made for a Writ herein prayed for.

Wherefore your petitioner prays that this Court will appoint as counsel L. R. Gustafson, or another suitable counsel, for him and pay for said counsel as provided by the laws of the United States and pursuant to Order of the Court, and order this petition and subsequent proceedings without cost to petitioner, and to issue a Writ of Habeas Corpus addressed to Don R. Erickson, Warden of the South Dakota State Penitentiary, ordering and directing him to have the body of the petitioner forthwith before the Court, and at that time that the petitioner be discharged from further custody.

He further asks that the Court release him on his own recognizance pending the hearing on this petition and that the Court set a time and a place for the hearing on this petition and prescribe the notice to be given, and that the Plaintiff's conviction for First Degree Robbery be declared void and his sentence based thereon be set aside, and that he be released from all restraint imposed thereby, and for such other and further relief as may be deemed equitable and just.

John Lee Feather

State of South Dakota)
) SS
County of Minnehaha)

John Lee Feather being first duly sworn according to law, deposes and says that he is the Plaintiff and petitioner in the above and foregoing petition; that he has read the same, knows the contents thereof, and that the same is true and correct of his own knowledge, except as to those matters stated upon information and belief, as to which he believes it to be true.

John Lee Feather

Subscribed and sworn to before me this 15 day of November, 1972

(SEAL)

Richard D. Rist
South Dakota Notary Public

RICHARD D. RIST, Notary Public
My Commission Expires Aug. 4, 1979

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of John Lee Feather — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of LaVerne Blackthunder — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Ambrose St. John — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY — (SEAL OF COURT)
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of James R. Keeble — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY — (SEAL OF COURT)
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Curtis Small — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Roman V. Derby — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Joseph Day — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Arnold LaFramboise — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 10th day of July, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Clarence Walker — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 10th day of July, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Theodore Duane Wynde — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 10th day of July, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 73-1453 to 73-1459
and
Nos. 73-1541 to 73-1543

UNITED STATES OF AMERICA
ex rel. JOHN LEE FEATHER, et al,
Petitioners-Appellants,

vs.

DON R. ERICKSON, Warden
South Dakota State Penitentiary,
Defendant-Appellee.

PETITION FOR REHEARING

L. R. GUSTAFSON
Attorney at Law
Britton, South Dakota

Attorney for Petitioners-Appellants

KERMIT A. SANDE
Attorney General
State of South Dakota

WALTER W. ANDRE
Assisstant Attorney General

Attorneys for Defendant-Appellee

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 73-1453 to 73-1459
and
Nos. 73-1541 to 73-1543

UNITED STATES OF AMERICA
ex rel. JOHN LEE FEATHER, et al,
Petitioners-Appellants,

vs.

DON R. ERICKSON, Warden
South Dakota State Penitentiary,
Defendant-Appellee.

PETITION FOR REHEARING

Pursuant to Rule 35(a) and Rule 40 of the Federal Rules of Appellate Procedure, the Attorney General of South Dakota representing the Warden of the State Penitentiary petitions for a rehearing in Banc from the decision entered by this Court in the above entitled cases on December 7, 1973.

Rule 35(a) of the Federal Rules of Appellate Procedure provides that a majority of the Circuit Judges of this Court in regular active service may order that an appeal be reheard:

(1) When consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) When the proceeding involves a question of exceptional importance.

I. NECESSITY TO MAINTAIN UNIFORMITY OF DECISIONS

In 1967 in the case of Beardslee v. United States, 387 F. 2d 280, 287 (8th Cir.) Judge Blackmun, now a Justice of the United States Supreme Court, wrote:

Federal jurisdiction is not present, of course, even though

an Indian may be the defendant, where the offense site was never reservation land or is on a disestablished portion of a reservation, however that disestablishment may have been effected. This is the obvious inferential holding of **Seymour** and is the direct holding in the following cases, among others: De Marrias v. South Dakota, 319 F.2d 845 (8 Cir. 1963), affirming 206 F. Supp. 549 (D.S.D. 1962); Ellis v. Page, 351 F.2d 250 (10 Cir. 1965); Toosigah v. United States, 186 F.2d 93, 97-98 (10 Cir. 1950); Bird in the Ground v. District Court, 239 F.Supp. 981, 983-984 (D.Mont. 1965). See United States v. La Plant, 200 F. 92, 93 (D.S.D. 1911). The Supreme Court of South Dakota has so ruled repeatedly. State v. Sauter, 48 S.D. 409, 205 N.W. 25, 28 (1925); Application of De Marrias, 77 S.D. 294, 91 N.W. 2d 480 (1958); Sate ex rel. Hollow Horn Bear v. Jameson, 77 S.D. 527, 95 N.W. 2d 181 (1959); State v. De Marrias, 79 S.D. 1,107 N.W. 2d 255 (1961), cert. denied 368 U.S. 844, 82 S.Ct. 72, 7 L.Ed. 2d 42; Lafferty v. State ex rel. Jameson, 80 S.D. 411, 125 N.W. 2d 95 (1964); State v. Barnes, 81 S.D. 511, 137 N.W. 2d 683 (1965); State ex rel Swift v. Erickson, S.D., 141 N.W. 2d 1 (1966).

At 287 F. 2d 280, 287 Judge Blackmun concluded that:

> ***Seymour** and **Kills Plenty** are distinguishable because they do not apply the definition of Indian country contained in §1151(c). Clause (c) came into the statute as the result of the holding in United States v. Pelican, 232 U. S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1942), namely that lands allotted to Indians remained within the definition of Indian country even though the rest of the reservation was opened to settlement.See Reviser's Note following 18 U.S.C.A. §1151 (1966), and 80th Congress House Report No. 304. Clause (c) is an addition to and not a limitation upon the definition of Indian country embraced in the precedingportions of §1151. We regard clause (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent". Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seem to be clear. See State ex rel. Hollow Horn Bear v. Jameson, supra, pp. 184-185 of 95 N.W. 2d.

Writing for the United States Court of Appeals for the Tenth Circuit, after he cited Toosigah v. United States (1950), 186 F.2d 93, Chief Judge Murrah also distinguished Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed. 2d 346, and decided:

> The question is sharply drawn and simply put by the state as whether at the time of the alleged offense the Cheyenne and Arapahoe reservation had been disestablished and was non-existent. If not, exclusive jurisdiction was in the United States, the state court lacked jurisdiction, and the writ should issue. We agree with the state and trial courts.
>
> Toosigah v. United States, supra, involved an offense defined in §1153 on what was originally the duly established Comanche, Kiowa and Apache reservation. Conversely to our facts, the petitioner there had been charged, tried and convicted in the federal court. We issued the writ and discharged the petitioner because we were ultimately of the view that the reservation had been completely disestablished by the Treaty of October 21, 1892 (ratified June 6, 1900), 31 Stat. 676, by the terms of which the tribes occupying the reservation did "cede, convey, transfer, **relinguish** (sic) and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced" within the reservation. Here the Cheyenne and Arapahoe Treaty of October, 1890 (ratified in 1891), 26 Stat. 1022, contains indistinguishably similar language, and the Toosigah case undoubtedly controls the jurisdictional question in this case unless it has been overruled sub silentio in Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed. 2d 346. The petitioner relies on Seymour as applicable and controlling.
>
> ***The Comanche, Kiowa and Apache Treaty in Toosigah and the Cheyenne and Arapahoe Treaty involved here were negotiated treaties or agreements between the government and the Indian tribes by which in consideration of the payment of money and allotments in severalty the tribes did "cede, convey, transfer, relinquish and surrender, forever and absolutely, without any reservation", all their claim in and to the lands embraced within the designated reservation. While the words of alienation employed in the treaties do not formally disestablish the reservations, we think they have the unequivocal effect of doing so. In treaty parlance they are as appropriate to disestablish the reservations as the Congressional words "vacate and restore" employed in

> the 1892 Act to disestablish a portion of the Colville reservation. And, the critical language is textually and contextually different from that employed in the 1906 Act to authorize the Secretary of Interior to "sell or dispose of unallocated lands in the diminished Colville Indian reservation". It is one thing to open an Indian reservation to mineral exploitation, allotment to Indians, and non-Indian homesteaders by Congressional enactment as in Seymour. It is quite another to agree by treaty to cede and relinquish all claim, title and interest in the lands within the limits of a reservation.
>
> As part consideration for the "cession of territory and relinquishment of title, claim, and interest" in the lands within the reservation, the government paid the Indians $1,500,000, $1,000,000 of which was retained in the Treasury of the United States to the credit of the Indians. The $500,000 was to be distributed to the Indians for their immediate use and benefit. The treaty evinces a manifest purpose to dissolve tribal government and assimilate the Indian allottees in the community in which they lived as citizens and owners of land with a grubstake to enable them to compete on an equal footing with their non-Indian neighbors.

Elliss v. Page (1965), 351 F. 2d 250, 251, 252. Also see State of Wyoming v. Moss, 471 P. 2d 333 (1970).

II. QUESTIONS OF EXCEPTIONAL IMPORTANCE

The impact that the decision of this Court in the above entitled case will have on the non-Indian people who inhabit portions of the counties in South Dakota embraced by the Sisseton-Wahpeton (Lake Traverse) Reservation is illustrated by the following statistics:

County	Total Population	Indian Population
Marshall	5,965	138
Day	8,713	292
Grant	9,005	17
Roberts	11,678	1,567
Codington	19,140	73
TOTAL	54,501	2,087

Source: United States Census, 1970

The State of South Dakota respectfully requests this Court to grant this Petition for Rehearing and review the conflicting decisions in these difficult jurisdictional cases. De Marrias v. State of South Dakota (1962), 206 F. Supp. 549; De Marrias v. State of South Dakota (1963), 319 F. 2d 845; Ellis v. Page (1965), 351 F. 2d 250; Beardslee v. United States (1967), 387 F. 2d 280; and State of Wyoming v. Moss (1970), 471 P. 2d 333.

Dated at Pierre, South Dakota this 14 day of December, 1973.

KERMIT A. SANDE
Attorney General
State of South Dakota

WALTER W. ANDRE
Assistant Attorney General
State of South Dakota

Attorneys for Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I served by mail two copies of this Petition for Rehearing upon L. R. Gustafson, Attorney at Law, Britton, South Dakota 57430, who represents the Petitioners-Appellants in the above entitled cases.

WALTER W. ANDRE
Assistant Attorney General
State Capitol Building
Pierre, South Dakota 57501

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1973

No. 73-1453. John Lee Feather, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1454. LaVerne Blackthunder, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1455. Ambrose St. John, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1456. James R. Keeble, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1457. Curtis Small, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1458. Roman V. Derby, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1459. Joseph Day, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1541. United States of America , ex rel Arnold LaFromboise, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1542. United States of America ex rel Clarence Walker, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1543. United States of America, ex rel Theodore Duane Wynde, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

Appeals from the United States District Court
for the District of South Dakota

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 8, 1974

Supreme Court, U. S.
FILED
JUL 29 1974
MICHAEL RODAK, JR., CLERK

APPENDIX NO. 1

Supreme Court of the United States

OCTOBER TERM

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent,
United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent,
United States of America ex rel.
AMBROSE ST. JOHN, Respondent,
United States of America ex rel.
JAMES R. KEEBLE, Respondent,
United States of America ex rel.
CURTIS SMALL, Respondent,
United States of America ex rel.
ROMAN V. DERBY, Respondent,
United States of America ex rel.
JOSEPH DAY, Respondent,
United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent,
United States of America ex rel.
CLARENCE WALKER, Respondent,
United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 8, 1974
CERTIORARI GRANTED JUNE 3, 1974

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Aug. 5, 1897.

The Commissioner
of Indian Affairs,

Sir:

Referring to your letter of July 27, 1897, Land - 29166-1897, inquiring as to the status of lots 1 and 2 Sec. 3 T. 124 N. R. 51 W., former Sisseton and Wahpeton Reservation, South Dakota, I have to state that the records of this office show that lot 1 was patented to Christina Belle Bailey, and lot 2 to Millie M. Bailey, July 22, 1889 - Recorded in Vol. 3 pp. 344 and 357.

These patents were sent to your office July 25, 1889.

Very respectfully,

Assistant Commissioner.

State of South Dakota)
(ss.
County of Roberts)

Henry S. Morris, being duly sworn, doth depose and say that he is a resident of the City of Sisseton, County of Roberts in the State of South Dakota and has been for the past six years. That in the year 1870, as a child he moved with his parents to the Goodwill Mission which is located near the Sisseton Agency within the former Lake Traverse Indian reservation in South Dakota. That during all of the years interveneing from 1870 to 1891, this affiant continued to live at the said Goodwill Mission with the exception of such time or times as he was away attending school or college. That since the year 1891 and up to the present time, he has been located, first at Brownsvalley, Minnesota, for a few months, then at Wilmot, South Dakota as clerk of the Circuit Court for the period of four years and since that at Sisseton, South Dakota. That the first named place to wit: Brownsvalley Minnesota, is located on the west line of the state of Minnesota and within a mile of the boundry line of the said Lake Traverse Indian Reservation. That the said town of Wilmot was the former County seat of Roberts County, South Dakota, in which the larger part of the former Lake Traverse Indian reservation is located. That the said town of Sisseton is situated within the former Lake Traverse Indian reservation and about eight miles distant from the Sisseton Agency. That by reason of these facts, the said affiant during all of these years been intimately acquainted with the Indians residing upon the said Lake Traverse Indian Reservation. That the said affiant speaks the Indian language as fluently as he speaks the English.

Affiant further deposes and says, that during the year 1891, as a United States special agent, he was engaged in the allotment of lands to the said Indians residing at the said Sisseton Agency and within the former Lake Traverse Indian reservation. That as such United States special agent, this affiant made allotment in the said year among others to one Ko zi pe and his family as more fully appears upon the allotment sheet number 73 of the allotment roll which was returned by this affiant to the honorable commissioner of the Indian affairs. That the number of the said

Ko zi pe on the said allotment roll I3I2 and that the names of the family of the said Ko zi pe and the descriptions of the lands allotted to him and to his family are asffollows : to Ko zi pe allotment # I3I2 the NE¼ of Sec. 3, Twp. I25, R. 5I. To Ocan ku to pa na allotment # I3I3, a son of the siad Ko zi pe but irroneously marked daughter upon the said allotment roll the N ½ of the NE ¼ and the E ½ of the NW ¼ Sec. 4, Twp. I25, R. 5I. To Wi ya wa xte win # I3I4 on the allotment roll wife of said Ko zi pe the SE ¼ Sec. 34, Twp. I26, R. 5I. To A ki ta pe win # I3I5, a daughter of said Ko zi pe the SE ¼ Sec. 33 Twp. I26, R. 5I and to Ma ko ce yu he na # I3I6 on said allotment roll a son of said Ko zi pe, the W ½ of the NE ¼ and the W ½ SE ¼ Sec. 3, Twp. I25, R. 5I, all of which will more fully appear, reference being had to the allotment rolls on file in the office of the honorable commissioner of Indian affairs. That the said Ko zi pe was placed upon the said roll and given the said allotment of lands by reason of the fact that an investigation made by this affiant as United States special agent, showed him to be a member of the Sisseton band of Sioux Indians. That he had no other allotments at any other Indian agency and was entitled to enrollment at the Sisseton Indian Agency and also by reason of the petition signed by Adam Littlethunder and other Indians members of the Sisseton and Wahpeton Band of Indians and located at the Sisseton Agency, which said petition was filed with the said allotment roll as appendix # 2. That when the investigation referred to herein was completed, and the said Ko zi pe appeared before this affiant for the purpose of selecting his lands for allotment, he appeared with one Adam Littlethunder already herein referred to, and in reply to the question of this affiant stated that his name was Ko zi pe or Ma ke wa xte xte or Ma to hna xkin yan and that the said Indian was accordingly enrolled under the name of Ko zi pe, that the Indian name Ma to hna xkin yan being interpreted means Crazy Bear and that the name as first given herein to Ko zi pe

was given by the said Indians as an attempted pronounciation of the words Crazy Bear, but was not at that time so understood by this affiant. Affiant further deposes and says that the Indian and his family to whom the above described allotments were made and who was enrolled in the said allotment roll as Ko zi pe # I3I2, and the Indian now residing near Sisseton upon the siad and above described lands and known as Crazy Bear or Ma to hna xkin yan is the same and identical person. Affiant further deposes and says that to the best of his knowledge and recollection no other Indian or Indians ever selected the above described lands or asked for the said lands to be allotted to them. Affiant furtner deposes and says that the investigation above referred to was made because of the fact that the said Ko zi pe or Crazy Bear had some time prior to I89I been residing at other Agencies in North Dakota and had not immediately prior to I89I been a resident at the Sisseton Indian Agency, and as this affiant now remembers was not enrolled upon the payment roll as prepared by the Indian agent Wm McKusick and special agent S. H. Elrod. Affiant further deposes and says that the matters sworn to herein are all matters of his own personal knowledge and recollection and are not matters (except as otherwise stated) which are based on information and belief.

Henry Sellows

Subscribed and sworn to before me this 30 day of September, 1902.

Notary Public

Washington, November 18, 1902.

Hon. A.B. Kittridge,

United States Senate,

Washington, D.C.

Sir:

Referring to your communication, dated August 22, 1902, in which you stated that the claim was made that certain described lands in the former Sisseton reservation should be relaived from Indians allotment on the ground that the allottee had another tract of land, and to office letter of September 18, 1902, in reply thereto, you are advised that this office is now in receipt of a communication from Agent C.H. Jackson of the Sisseton Agency, dated November 8, 1902, in which he transmits the evidence taken by him covering the following allotments, No. 1312, Kosipi, the N.W. /4 of Sec. 3, T. 125, R. 51; No. 1313, O-can-ku-to-pa-win, the W/2 of the NW/4 and the W/2 of the NW/4 of Sec 4, T. 125, R.51 W; No. 1314. Mi-ya-wa-ste-win, the SW/4 of Sec. 34, T. 126, N. of R. 51 W.; No. 1315. A-ki-ta-pi-win, the SW/4 of Sec. 33, T. 126, N. of R. 52, W.; No. 1316, Ma-ko-ce-yu-he-na, the W/2 of the N.W./4 and the W/2 of the SW/4, Sec. 3, T.125, N. of R. 50 W.

According to the schedule on file in this office allottee, No. 1314 is the wife of No. 1312, Nos. 1313 and 1315 are the daughters and No. 1316 is the son of No. 1312.

At the hearing before the Agent it was contended by the parties attacking the allotments that ~~these~~ these allotments were selected by and for Hin-han-ko-yag-mani, or Walks with Owl, a Crow Creek Indian, who, with six children, was allotted on the Crow Creek reservation.

It is contended by the allottee, and supported by the evidence among other witnesses, of Special Allotting Agent, H.H. Morris, who made the allotments, that Ko-zi-pi is an Indian, named in English, Crazy Bear, or in Indian, Ma-to-hna-skin-yan.

There appears to be no reasonable doubt that Crazy Bear was the Indian intended to be allotted.

It is further maintained by those attacking the allotments, that Crazy Bear was not entitled to allotment, as he belonged to the hostiles, who were assigned to the Devil's Lake reservation, in North Dakota.

Regarding this contention, Special Alloting Agent Morris, swears that in 1891 he made allotments to the Sisseton Indians, and among others, to Ko-zi-pi and his family, as more fully appears on allotment sheet No.75, He describes the allotments and states that No. 1313 was made to O-can-ku-to-pa-win, a son of Ko-zi-pi, but erroneously marked " daughter" on said schedule; that said Ko-zi-pi , was placed upon the roll and given allotments by reason of the fact that an investigation was made by him as Special Alloting Agent showed Ko-zi-pi to be a member of the Sisseton and Wahpeton, Band, of Sioux Indians; that he had no other allotments at any other Indian Agency, and was entitled to enrollment at the Sisseton Agency. and also by reason of a petition signed by Adam Little Thunder, which petition was filed with said allotment schedule as an appendix, that when the investigation was completed Ko-zi-pi appeared before the affiant for the purpose of selecting his land, that he appeared with Adam Little Thunder and stated that his name was Ko-zi-pi, or Ka-ke-wa-xte-xte or Ma-to-hna-xkin-yan, and that said Indian was enrolled under the name of Ko-zi-pi. the name of Ma-to-hna-xkin-yan, meaning Crazy Bear, and Ko-zi-pi, being an attempted pronunciation by the Indian of Crazy Bear.

The petition referred to is on file in this office, It is signed by J.R. Brown, and twenty seven other members of the tribe, who state that they know Ko-zi-pi Ka-ke-waste-ste to be a Sisseton and Wahpeton Indian by blood and worthy to receive an allotment on the Lake Traverse Reservation, they therefore petition that allotments be made him and family. To this is added a note " 4 in total) and one born since the above was written".

On this statement, and Special Alloting Agent Morris's report, the allotments of Ko-zi-pi and the four members of his family were approved.

It has always been found impossible to strictly draw the line between the loyal members of the Sisseton and Wahpeton Bands and those who were either hostile or else, through fear or other causes, fled with the hostile at the time of the outbreak. It is well known that some of the Indians upon the Sisseton and Wahpeton reservation, were either actively disloyal

or else accompanied the hostiles. Two reservations were provided for these bands, one at Sisseton and one at Devil's Lake the latter being for the hostile Indians.

Crazy Bear is admitted to be a member of the Sisseton Band and he has not been allotted on the Devil's Lake Reservation. His son has improvements upon h s allotment, and the father and mther live with him. This office sees no good reason for cancelling the allotment made to him eleven years ago, and allowing him to take lands on the Devil's Lake reservation. In the opinion of this office the allotent should stand.

Very Respectfully,

W.A. Jones,

Commissioner.

House of Representatives U.S.
Washington D C

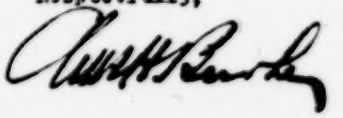
February 10, 1908.

Hon. Commissioner of Indian Affairs,
Washington, D. C.

Sir:

I would respectfully request to be informed as to the present status of a contest, instituted by one Joseph Halbauer, against allotment #410, for the S.W.1/4 N.W.1/4, N.W.1/4 S.W.1/4 13, and S.E.1/4 N.E.1/4 and N.E.1/4 S.E.1/4 14-125-54, in what was formerly the Sisseton Indian Reservation in South Dakota.

Respectfully,



Land-Sales
6451-1912
88028-1912
J F M

Transmits patent in fee.

FOR FILE

NOV 13 1912

Mr. Sanford E. Allen,

Supt. Sisseton School.

Sir:

There is enclosed patent in fee No. 299022 issued to Nick Weis, purchaser of Lots 2, 3 and 4 and the E/2 of the NW/4 of Sec. 24, and Lot 2 of Sec. 13, T. 120 N., R. 53 W. of the 5th P. M. in former Sisseton and Wahpeton Reservation in South Dakota, 166.40 acres of the allotment of Sophia W. Vanderheyden, deceased Sisseton allottee No. 64.

You will deliver the patent to the patentee, taking his receipt therefor in duplicate, the original of which you will transmit to this Office.

Instructions as to the disposition of the proceeds of the sale were given you in Office letter of October 29, 1912 (6451-12).

Respectfully, FILED BY E. S. S.

(Signed) F. H. Abbott

[redacted] Commissioner.

11-PTH-11

J F M

Transmits patent in fee.

APR -3 1913

FOR FILE

Mr. Sanford E. Allen,

Supt. Sisseton School.

Sir:

There is enclosed patent in fee No. 320419, issued to Nils E. Olson, purchaser of the NE/4 of the NW/4, and Lot 1 of Sec. 30, T. 124 N., R. 50 W. of the 5th P.M., in former Sisseton and Wahpeton Reservation, South Dakota, containing 79.56 acres of the allotment of Emma Redearth, noncompetent Sisseton allottee No. 632.

You will please deliver the patent to the purchaser, taking his receipt therefor in duplicate, the original of which you will transmit to this Office. Instructions as to the disposition of the proceeds of the sale were given you in Office letter of March 12, 1913.

Respectfully,

(Signed) John H. Edgerton

4-WJ-2. Acting Chief Land Division.

...3 1918.

Dear Mr. Johnson:

Receipt is acknowledged of your Secretary's letter of October 31, 1918, transmitting certain correspondence relative "Farm homes for returning Soldiers", including copies of two letters from the Board of Trustees of the Town of Auen, South Dakota.

The lands referred to in the correspondence is described as 60,000 acres Government land in Marshall County, South Dakota, and it is suggested by the Commissioner of the General Land Office, in his letter to you of August 24, 1918, that the lands referred to are believed to be in the former Sisseton Indian reservation which were reserved for school, church and agency purposes, and that the area covers only 24,000 acres.

An examination of the records of this Office show that 32840.25 acres comprising sections 16 and 36 within the former Lake Traverse Reservation in South Dakota, were reserved for common school purposes and made subject to the laws of the state wherein located. These lands were granted to the state for school purposes under the provisions of the Act of March 3, 1891 (26 Stat. 1036-1039), and this Department has no jurisdiction over said lands. In addition to the acreage reserved for school purposes 697 acres was reserved for various religious bodies, and 650.01 acres for administrative purposes in connection with the Sisseton Agency. The total acreage included in the several reservations above enumerated amounts to 34187.26 acres, and of this entire amount only 650 acres remains under the jurisdiction of this Department.

It seems from the foregoing that your correspondents have been misinformed both as to the acreage involved and as to its present status. The papers submitted are returned, and there is also enclosed an extra copy of this letter.

Very truly yours,

Hon. Royal C. Johnson,

House of Representatives. Assistant Commissioner.

11 RIO 6

OFFICE OF INDIAN AFFAIRS
RECEIVED
AUG 29 1918
1587

...ust 26, 1918.

Hon. Royal C. Johnson,

House of Representatives.

My dear Mr. Johnson:

I am in receipt of your letter of August 26, 1918, inclosing a communication addressed by the Board of Trustees of the Town of Auen, South Dakota, to Mr. W. L. Martin, Vice President of the "Soo-Line", Minneapolis, Minnesota, also copy of letter addressed by said Board ... U. S. Reclamation Service of this Department.

... attention to certain re... Lands in Marshall County, South Dakota, which ... are to be improved and made available for farm ... for returning soldiers and sailors. They estim... ...ands at $75.00 acre.

... lands referred to are

...ceptable ...

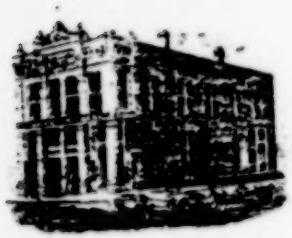
...Register ... 34,000 acres.

... to be taken ...

... for continuing the reservations ... therefore ... relative ... the ... to enable you as ... to ... easily for continuing the reservations.

Very respectfully,

Commissioner.



THE Bank of Milbank

SARGENT & DIGGS, BANKERS.

MILBANK, DAKOTA.

April 22nd '89

Gen'l John W.Noble,
Sec'y Interior .
Washington D.C.

My Dear Sir ;

Will you kindly inform me what is the present status

It lies along the westren line of our county and Roberts north of us , and is a great detriment to our intresets , as it blocks the progress of two or three lines of railroad that we are very anxious to see completed.

We need these roads badly , and the opening of the reservation would give new impetus to immigration which has been attracted by govern - ment lands further west .

Any information that will enable the citizens of this section to render any service that may be needed in hastening the opening will be appreciated .

We also respectfully ask your early attention to the matter if the consummation is left with your department , as I have been informed it is .

If any need should exist for a special agent here , in the opening -, or a commission to be appointed , I trust you will remember

Yours truly.

D.W. Diggs

RESOLUTIONS OF THE CONVENTION

of Eight Counties that Assembled at Watertown, Dakota, May 1st, 1909, to take Action Relative to the Opening of the Sisseton Indian Reservation.

---o-O-o---

"Whereas, The Sisseton Indian Reservation, lying in the midst of a well settled section of country, is a barrier to the completion of railroads in course of construction or progress, and the general welfare of the country, and is not now necessary to the interests of the Indians, they having taken their allotment of land under the Act of Congress, and,

WHEREAS the Indians on this reservation have certain grievances which they urge as a reason for withholding their consent to final action necessary to opening the Reservation to settlement.

RESOLVED: That it is the sense of this convention composed of citizens of all the counties contiguous to the said Reservation that the government of the United States owes a debt of gratitude to all Indians who were loyal and rendered service or befriended the white man in the terrible scenes of the massacre of 1862, and that Chief Gabriel Renville having been conspicuous as a friend of the government and the white man, the government should recognize such loyalty and service in some substantial form.

RESOLVED, That as citizens we will use our influence to secure to Chief Renville and all other Indians who were loyal to the government, who are now members of his band, that justice that has been denied them. Confident that the government will promptly accord to them such compensation as judgment they are under the law entitled, and will see

that the provisions of treaties heretofore made are scrupulously carried out to the end, that any wrong to them resulting from neglect shall be speedily redressed.

RESOLVED, That we recommend to congress, that all men in this band who acted as scouts under Genl. Sibley be suitably rewarded for their loyalty and valuable services.

RESOLVED, that we urge upon the Secretary of the Interior the importance of immediately adjusting all just claims in order that the Sisseton Reservation may be speedily opened

RESOLVED, That it is the sense of the convention that each of the counties of Day, Grant, Roberts, Traverse, Richland, Sargent, Marshall and Codington be requested through their committeemen to contribute the sum of one hundred dollars for the purpose of defraying the expenses of the several committees appointed by this convention:

D. T. DIGGS,
H. E. PEASE,
A. M. KITTON,
E. J. SPEAR,
SHELBY SMITH,
JAMES ROSS,
THOS. C. ROUSE."

I hereby certify the above to be a true copy of the Resolutions passed by the Convention held at Watertown for the purpose of securing the early opening of the Sisseton Indian Reservation

D T Diggs

Milbank S.D. 5/5/09

The Minneapolis Tribune.

NO. 12 WEDNESDAY MORNING, MAY 22 1889

A LARGE POW-WOW.

A Council at Big Brule to Urge the Opening of the Sisseton Reservation.

Chief Gabriel Renville, with His Head Men, and the Rigorous Convention Committee in Attendance.

Indians Complain that Their Services to the White Men in 1862 Entitle Them to Better Treatment.

Appeals for Land for Their Children Specimens of Indian Eloquence—Leader's Sentiment.

HUTCHINSON, S. D., May 21.—[Special.] The committee appointed by the convention at Watertown to go to Washington to urge the completion of the Sisseton treaty by opening the Sisseton reservation, held a council with Chief Gabriel Renville and nine of his head men at the Big Coulee today. After partaking of a bountiful feast which had been prepared by the committee, the party adjourned to a beautiful grove. The Indians seated themselves on the ground in a semi-circle, with the committee occupying chairs. Gen. Pease called on Rev. Chas. H. Crawford, a half brother of the chief, to invoke the dinner blessing, after which the general stated the object of the council to be to ascertain their views in regard to opening the reservation. He introduced [illegible] stenographer to report proceedings, Chief Gabriel Renville was the first to speak, Rev. Mr. Crawford interpreting. The chief said in substance:

I don't feel that I made [illegible] when the white man [illegible]

[illegible] South Dakota we will be one and help each other. We thank you and depend on you to help us.

[illegible] have advanced and shook hands with Gen. Pease and Maj. Diggs, Maj. Hopkins, Edmund Cook spoke, telling them that they must not expect too much. That the great father and the secretary of the interior were just here, and would do all they could for them, but must work in congress didn't favor them with their hearts, and didn't [illegible] they thought, and if they couldn't get all they asked they had better take all they could get. As they sat around on the ground, each one smoked a few whiffs from a stone pipe with a long stem and passed it on to his next neighbor. At the conclusion of each sentence, by the interpreter, or at one of their own speakers, they grunted in chorus "ugh," in approval. It was very noticeable that to the last named sentence there was a dead silence. The pow-wow ended, after a continuous session of [illegible] three hours, by hand shaking all around.

THE BANK OF MILBANK.

Sargent & Digge, Bankers.

Milbank, South Dak. 5/13 1889

John W. Noble Esq

My Dear Sir:

I presume you are annoyed by my frequent communications, but the matter of opening the Sisseton Reservation is one of sufficient importance to all our people to warrant the utmost effort to secure it.

Hoping to hear from you soon.

Yours Sincerely,

Digge

Washington, January 19, 1888.

The Honorable,
The Secretary of the Interior.

Sir:

I have the honor to acknowledge the receipt, by Department reference, of a communication from D. H. Biggs, of Pilcenk, South Dakota, dated May 4, 1888, in which he states that a convention of delegates from all the counties contiguous to the Sisseton reservation, was recently held at Watertown, to consult as to the steps necessary to secure the early opening of said reservation to settlement.

He states that the reservation has for years been a barrier to the extension of much needed railroads, and asks if there is any thing that can be done to facilitate its opening.

The Sisseton reservation, created by the treaty of February 19, 1867, (15 Stats., 505), contains 918,720 acres of which some 107,440 acres have been allotted in severalty, and 1,417 acres reserved for church and other purposes, leaving a surplus of some 799,863 acres.

In his report dated December 10, 1887, submitting schedules of allotments made on this reservation, Special Agent Lightner expressed the opinion that the Indians were then unalarmed by clauses of a part of these surplus lands, and that it would be advisable to negotiate with them, re-

because many of them were needy and should have houses built, &c.

The 5th section of the Act of February 8, 1887 (24 Stats., 389), provides "That at any time after lands have been allotted to all of the Indians of any tribe, as herein provided, or sooner, if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portion of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress."

The treaty of 1867 contains no provisions applicable to such negotiations.

The allotments on this reservation have virtually been completed, although it is possible that there may be a very few persons still entitled to allotments, who were not found by Special Agent Lightner.

It would, I believe, be for the best interests of the Indians to throw open to settlement a large portion of their surplus lands on such just and equitable terms as may be agreed upon by them.

There is no appropriation available for the payment of a Commission to negotiate for the purchase of the surplus lands.

Such negotiations can proceed no further than securing the consent of the Indians to the sale of such portion of the reservation as may be agreed upon, and determining the considerations for which they are willing to make the cession, these negotiations to be submitted for the approval of Congress, which alone can prescribe the form and manner of executing the necessary release.

Such preliminary negotiations might be held with the Sisseton Indians during the present season, (after the delivery of their patents now in preparation) to be conducted by an officer or officers now in the service, specially designated thereto, if it shall be considered by the Department wise to take such proceedings.

An Inspector of the Indian service and a Special Indian Agent, acting with the resident Agent for the Sisseton Agency, might be constituted a Commission for the purpose, or, omitting the resident Agent, and substituting in his stead, a Special Agent of the General Land Office or an Officer of the Army stationed in the vicinity, to serve as one member of the Commission, if advisable.

Very respectfully,

Your obedient servant,

A. B. Reed

Acting Commissioner.

Allen.

Department of the Interior.

OFFICE OF INDIAN AFFAIRS.

WASHINGTON August 18, 1888.

Sir:

I have the honor to transmit, herewith, for your approval, draught of instructions for the guidance of a Commission (to be appointed) to negotiate with the Sisseton and Wahpeton Indians for the sale of their surplus lands under the provisions of the Act of February 8, 1887, (24 Stats., 388).

Very respectfully,

Your obedient servant,

J. D. C. Atkins

Commissioner.

(Allen)

OFFICE OF INDIAN AFFAIRS

Washington August 18,1904.

Dear Sir:

Upon receipt hereof,you will proceed to the Standing Agency,Nevada,for the purpose of negotiating with the Shoshone and Paiute Indians for the relinquishment of such portions of the Lake Tahoe Reservation,not allotted,as said Indians may consent to relinquish.

Such negotiations are authorized by the 8th Section of the Act of February 7,1887,which provides: " That at any time after lands have been allotted to all the Indians of any tribe as herein provided,or sooner if in the opinion of the President it would be for the best interests of said tribe,it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe,in conformity with the treaty or statute under which such reservation is held,of such portions of its reservation not allotted as such tribe shall,from time to time,consent to sell,on such terms and conditions as shall be considered just and equitable,between the United States and said tribe; which purchase shall not be complete until ratified by Congress,and the form and manner of executing such release shall also be prescribed by Congress".

The Lake Tahoe Reservation was created by the Act of June 1,1880 (21 Stats.,146) to carry into effect the treaty between the United States and the Pyramid Lake and Walker River bands of Paiute Indians,concluded October 1,1859 (11 Stats.,V.).

In addition to the latter,of which some 1,000 acres have been allotted in severalty and 1,417 acres reserved for church and other purposes,leaving a surplus of some 760,470 acres.

The allotments have virtually been completed,although it is possible that some few individuals who were not on the reservation when the allotments were made in 1907 are entitled to allotments.

The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof.

It is understood that the Indians desire to sell a portion at least,of their surplus lands.

You will call a full council of the bands and submit the subject for their consideration. If a majority of such council determine to sell any portion of the reservation,you will then agree upon the quantity of land to be sold,and its location,which should be described by sections,or other legal subdivisions of township.

It is not considered advisable that the cession at this time should embrace all these surplus lands. A sufficient quantity should be reserved for future contingencies.

The terms and conditions of the sale should then be agreed upon,which should be just and equitable to the Indians,as well as to the United States.

You will explain to the Indians that under the Act of May 27,1902 (32 Stats.,245) the sum agreed to be paid as purchase money,will be in

in the treasury of the United States for which said Indians with interest thereon at 5 per cent per annum,to be at all times subject to appropriation by Congress for the education and civilization of said Indians.

The terms and conditions agreed upon in Council,with the description of the lands to be relinquished,should be reduced to writing and incorporated in the accompanying form of agreement which should be signed by at least a majority of the male adults of the bands.

All such adults should be given an opportunity to sign.

When freely and precerly signed,your certificates and the certificate of the Official Interpreter,should be attached to the instrument.

The proceedings of the Council should be reduced to writing and attested by your signatures and that of the Official Interpreter.

The Indians should be informed that the negotiations will not be valid or binding until ratified by Congress.

Very respectfully,

(Signed)

Agent.

Department of the Interior,

OFFICE OF INDIAN AFFAIRS,

WASHINGTON, [illegible] 12, 1889.

The department

The Commissioner of Indian Affairs.

Sir:

Referring to your communication dated September 5,1889,designating

U.S. Indian Inspector,

Asst. Adjt. Gen'l, Dept. of Dakota,

U.S. Indian Agent,

for the duty of conducting negotiations with the Sisseton and Wapeton Indians for the sale of their surplus lands,and to your letter of September 27,1889,revoking the designation of Hon. [illegible], I have the honor to recommend that Gen. Whittlesey,Secretary of the Board of Indian Commissioners,be designated in place of Mr. [illegible] and that A. [illegible],Esq.,Chief of the Land Division of this office,be detailed to act with Agent [illegible], who is now engaged in important duty at a place remote from the Sisseton reservation.

[illegible] and to hold them free from the [illegible] of the members of the Board of Indian Commissioners.

The appointment of Mr. [illegible] is recommended because it is [illegible] one of the Citizens' Delegation [illegible]

[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]

1. Parallel structure.
a. Parallelism in the clause functions best if the first "shall" (line 3) controls both of the "be subject" predicates (lines 7 and 12). If the intention of the writer were to create a parallel with "shall be reserved" (line 11), he may either have found a more convenient way to express "subject to entry and settlement" (lines 7-8) (e.g., "entered and settled"), or have omitted the "be" in the final verb and the final comma (line 12) (i.e., "be reserved for common school purposes and subject to the laws of the State wherein located.")

b. The verb phrase which begins with "shall" in line 3 is not completed until line 7 with "be subject." Assuming that the second "be subject" (line 12) is controlled by the same "shall," there is a parallelism in style in which the completion of the verb is delayed by intervening parenthetical material. On the other hand, the other "shall" verb phrase--"shall be reserved" (line 11)--is not separated, implying that it is a single unit functioning only within a subordinate clause.

c. The use of one auxiliary to control two verbs of essentially different, even contradictory, meanings would be unusual. Hence the "shall" of line 11 is probably not intended to control both "be reserved" (line 11) and "be subject" (line 12).

2. Word Order.
a. Although it may seem natural that modifying elements would be placed in close proximity to the modified material, suggesting that the final phrase logically attaches to the second "shall," such need not be the case. The clause is of the structural type known as periodic, which means that the important parts of a sentence are suspended until the end. As a stylistic device, the periodic structure was common up through the nineteenth century, but is not much used today.

b. The first "shall...be subject" (lines 3, 7) is interrupted by two significant modifying prepositional phrases: "upon the payment..." (line 3), and "upon completion..." (line 6). Another modifying phrase--"excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes..." (lines 9-12)--is inserted to permit the second "be subject" (line 12) to appear last. If the sentence were to end with a non-restrictive "which" clause (lines 11-13), all the care that the writer took to state the prepositional modifiers of the first "be subject" verb come to nothing.

3. Punctuation.
Commas are used for two purposes in the clause: to separate items in a series and to set off non-restrictive modifiers.

a. The verbals in lines 1-2 create a sequence of more than two, and the commas are used in the obvious and conventional manner. Less obvious is the comma between "act" and "and upon..." in lines 5-6. Normally, a comma is omitted when the series has only two items separated by a conjunction. The presence of a comma at that point argues that the final comma (line 12) also separates two serial items, making the final phrase dependent on the "shall" of line 11. There are two differences, however. One is that the "upon" phrases (lines 3-7) are quite long, justifying a pause even though strictly speaking a comma is not required. The final lines are much shorter. The second difference is in the parallelism. The two "upon" phrases are totally parallel and equal. In lines 11-13, had the writer wished to maintain the parallel structure he so carefully uses throughout, he would probably have repeated the words "which shall." These lines do not appear to be items in a series.

b. The use of commas operating in pairs to set off non-restrictive modifiers appears consistent. The commas before the first "upon" (line 3) and after "agreement" (line 7) enclose the parenthetical material separating the auxiliary "shall" from its companion "be subject" (line 7). Likewise, the comma before "excepting" (line 9) and after "purposes" (lines 11-12) set off a statement which qualifies the verb "be subject" (line 7). This final comma (line 12) performs a double duty in that it also sets off the "which" clause, an adjectival subordinate clause modifying "sections" (line 10).

4. Summary.
The foregoing observations and analyses support the conclusion that the writer's intent was to allow the first "shall" to control the final phrase, with the resultant interpretation that all of the lands, not just those sections reserved for school purposes, are to be subject to state law.

The faculty members listed below contributed to the analysis of this passage but do not necessarily concur with all of the details of the statements.

Assoc. Prof. Raphael Block
Assoc. Prof. Stephen Dill
Assoc. Prof. Thomas Gasque
Asst. Prof. Gervase Hittle
Asst. Prof. William Lemons
Asst. Prof. Susan Robbins
Asst. Prof. Adrian Weiss

APPENDIX

The following diagrammatic arrangement, keeping original punctuation but capitalizing the main elements, summarizes the analysis:

That

THE LANDS

by said agreement

ceded ,
sold ,
relinquished,
and conveyed } to the United States

SHALL

immediately

,upon { the payment to / the parties entitled thereto / of their share / of the funds / made immediately available / by this act } , and upon { completion of / the allotments / as provided in / said agreement } ,

BE SUBJECT

only

TO { ENTRY and / SETTLEMENT } under the homestead and townsite laws of the United States

,excepting { the sixteenth and / thirty-sixth sections / of said lands } ,which { shall be / reserved / for common / school purposes },

and

BE SUBJECT

TO THE LAWS of the State wherein located:

APPENDIX NO. 2

Supreme Court, U. S.
FILED
JUL 29 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent,
United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent,
United States of America ex rel.
AMBROSE ST. JOHN, Respondent,
United States of America ex rel.
JAMES R. KEEBLE, Respondent,
United States of America ex rel.
CURTIS SMALL, Respondent,
United States of America ex rel.
ROMAN V. DERBY, Respondent,
United States of America ex rel.
JOSEPH DAY, Respondent,
United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent,
United States of America ex rel.
CLARENCE WALKER, Respondent,
United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 8, 1974
CERTIORARI GRANTED JUNE 3, 1974

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In The

UNITED STATES DISTRICT COURT

District of South Dakota, Southern Division

CIV 72-4055

ROSEBUD SIOUX TRIBE,

Plaintiff

vs.

HONORABLE RICHARD KNEIP, Governor of the State of South Dakota; GORDON MYDLAND, Attorney General of the State of South Dakota; THE COUNTY OF MELLETTE; THE COUNTY OF LYMAN; THE COUNTY OF TRIPP; and THE COUNTY OF GREGORY,

Defendants

BRIEF OF PLAINTIFF

Richard A. Smith
Mark V. Meierhenry
South Dakota Legal Services, Inc.
P. O. Box 227
Rosebud, South Dakota 57570

Art Bunce
On the Brief

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III. This Court must consider four principles in determining whether a certain piece of land is "Indian country" for jurisdictional purposes. 4

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C. Doubtful expressions in treaties and statutes dealing with Indian affairs will be construed in favor of the Indians. 8

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V. Those chiefly responsible for the administration of the three acts do not regard the three acts as having diminished the Rosebud Reservation. 24

A. Various Presidential proclamations indicate that at least two Presidents have interpreted the three acts not to have diminished the Rosebud Reservation.. 24

B. The Secretary of the Interior has interpreted the three acts as not having diminished the Rosebud Reservation.. 25

C. The Field Solicitor for the Bureau of Indian Affairs regards the three acts as not having altered the boundaries of the Rosebud Reservation.. 26

VI. Since the plain language of the three acts is substantially identical to the plain language of the acts considered in Seymour, New Town, and Condon, this Court must adhere to the principles of these cases in interpreting the three acts. . . . 27

A. The plain language of the three acts is substantially identical to the plain language of the acts considered in Seymour, New Town, and Condon. 27

B. The Mellette County Act contains a phrase which renders Congress' intent regarding the future status of that part of the Rosebud Reservation uncertain and therefore subject to the rule that doubtful expressions be resolved in favor of the Indians in statutes passed for their benefit. 45

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Cherokee Nation v. Georgia, 30 U.S. 95 Pet.) 1 (1831)

Choate v. Trapp, 224 U.S. 564; 28 S.Ct. 207 (1912)

City of New Town, N.D. v. United States, 454 F.2d 121 (8th Cir., 1972)

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir., 1956)

Groundhog v. Keeler, 442 F.2d 674 (10th Cir., 1971)

Hebah v. United States, 456 F.2d 696 (Ct. Cls., 1972)

Kain v. Wilson, 161 N.W.2d 704 (1968)

Lafferty v. South Dakota, 125 N.W.2d 171 (1963)

Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (U.S.D.C.S.Minn., 1971)

Littell v. Nakai, 344 F.2d 486 (9th Cir., 1965)

Lone Wolf v. Hitchcock, 187 U.S. 553; 23 S.Ct. 216 (1903)

Menominee Tribe v. United States, 391 U.S. 404; 88 S.Ct. 1705 (1968)

Minnesota v. Hitchcock, 185 U.S. 373; 22 S.Ct. 650 (1902)

Morrison v. Work, 266 U.S. 481; 45 S.Ct. 149 (1925)

Organized Village of KaKe v. Egan, 369 U.S. 60; 82 S.Ct. 562 (1962)

Pigeon River Improvement Co. v. Cox, 291 U.S. 138; 54 S.Ct. 361 (1934)

Puyallup Tribe v. Department of Game, 391 U.S. 392; 88 S.Ct. 1725 (1968)

Red Bird v. United States, 203 U.S. 76; 27 S.Ct. 29 (1906)

Seminole Nation v. United States, 316 U.S. 286; 62 S.Ct. 1049 (1942)

Seymour v. Superintendent, 368 U.S. 351; 82 S.Ct. 424 (1962)

Smith v. Temple, 152 N.W. 2d 547 (1967)

South Dakota ex rel. Hollow Horn Bear v. Jameson, 95 N.W. 2d 181 (1959)

South Dakota v. Barnes, 137 N.W. 2d 683 (1965)

South Dakota v. DeMarrais, 107 N.W. 2d 225 (1961)

South Dakota v. Molash, Eighth Judicial Circuit, S.D., February 10, 1971 appeal perfected March 22, 1971

South Dakota v. Molash, appeal #10959, opinion filed July 19, 1972

South Dakota v. Mongram, Eighth Judicial Circuit, S.D., February 10, 1971; appeal perfected March 22, 1971

South Dakota v. Sauter, 205 N.W. 25 (1925)

Squire v. Capoeman, 351 U.S. 1; 76 S.Ct. 611 (1956)

Stevens v. Commissioner, 452 F.2d 741 (9th Cir., 1971)

The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866)

Tooisgah v. United States, 186 F.2d 93 (10th Cir., 1950)

Union Pacific Railroad Co. v. Harris, 215 U.S. 386; 30 S.Ct. 138 (1910)

United States ex rel. Condon v. Erickson, U.S.D.C., D.S.D. June 27, 1972, CIV71-175

United States ex rel. Creek Nation v. Rea-Read Mill & Elevator Co., 171 F. 501 (C.C.E.D. Okla., 1909)

United States ex rel. Miner v. Erikson, 428 F. 2d 628 (8th Cir., 1970)

United States v. Brindle, 110 U.S. 688; 4 S.Ct. 180 (1884)

United States v. Celestine, 215 U.S. 278; 30S. Ct. 93 (1909)

United States v. Gilbert Associates, 345 U.S. 361; 73 S.Ct. 701 (1953)

United States v. Jackson, 280 U.S. 183; 50 S.Ct. 143 (1930)

United States v. Kagama, 118 U.S. 375; 6 S.Ct. 1109 (1886)

United States vs Rayne, 264 U.S. 446; 44 S.Ct. 352 (1924)

Williams v. Lee, 358 U.S. 217; 79 S.Ct 269 (1959)

Williams v. United States, 251 F. 2d 1 (9th Cir., 1954)

Winters v. United States, 207 U.S. 564; 28 S.Ct. 207 (1908)

Wood v. Jameson, 130 N.W. 2d 95 (1964)

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)

2. Statutes, Treaties, and Presidential Proclamations:

Treaty of Sept. 17, 1851; 11 Stat. 749

Treaty of April 29, 1868; 15 Stat. 635

Act of February 8, 1887; chap. 119 24 Stat. 388

Act of March 2, 1889; chap. 405; 25 Stat. 888

Act of March 3, 1891; chap. 561; 26 Stat. 1097; 43 U.S.C. § 161 et seq

Act of July 1, 1892; chap. 140; 27 Stat. 62

Act of April 23, 1904; chap. 1484; 33 Stat. 245

Act of March 22, 1906; chap. 1126; 34 Stat. 80

Act of March 2, 1907; chap. 2536; 34 Stat. 1230

Act of May 29, 1908; chap. 218; 35 Stat. 460

Proclamation of May 13, 1904; 33 Stat. 2354

Proclamation of August 24, 1908; 35 Stat. 2203

Proclamation of August 19, 1909; 36 Stat. 2500

Act of May 30, 1910; chap. 260; 36 Stat. 448

Act of June 1, 1910; chap. 264; 36 Stat. 455

Act of March 3, 1927; chap. 299; 44 Stat. 1347 §4; 25 U.S.C. § 398 (d)

Act of June 18, 1934; chap. 576; 48 Stat. 984; 25 U.S.C. §476 et seq

Act of June 25, 1948; chap. 139; 62 Stat. 757; 18 U.S.C. §1151

Act of June 25, 1948; chap. 645; 62 Stat. 758; 18 U.S.C. §1153

Act of June 17, 1954; chap. 303; 68 Stat. 250. 25 U.S.C. §891 et seq.

3. Miscellaneous:

Memo. Field Solicitor, Aberdeen Office, Bureau of Indian Affairs, April 6, 1972

Memo. Acting Sol. I.D., May 25, 1937

Congressional Record, May 26, 1908; January 21, 1904; April 27, 1910

Report of Commissioner of Indian Affairs (1916)

Felix S. Cohen, Handook of Federal Indian Law, Government Printing Office, 1942

Charles Lowell Green, The Administration of the Public Domain in South Dakota, South Dakota Historical Collection, Vol. 20 (1940)

Report No. 443, House of Representatives, H.R. 10418, 58th Congress, 2nd Session, January 21, 1904

Constitution and By-Laws of the Rosebud Sioux Tribe of South Dakota, Approved by Secretary of the Interior, December 16, 1935

INTRODUCTORY STATEMENT

The Rosebud Sioux Tribe has brought this declaratory judgment action seeking declarations that three acts of Congress did not diminish the Rosebud Reservation or alter its bourdaries from those defined in the Act of March 2, 1889. The defendants assert that the three acts did diminish the Rosebud Reservation so that the reservation now embraces only Todd County, South Dakota. Acting on this assertion, the defendants have been exercising civil and criminal jurisdiction over members of the Rosebud Sioux Tribe within those parts of the reservation of 1889 in the counties of Mellette, Tripp, Lyman and Gregory. In these areas the defendants also collect a tax on sales to members of the tribe, regulate hunting and fishing, etc. On the other hand, the tribe, pursuant to its inherent sovereignty and to its specific authority under its federally approved constitution, is entitled to exercise these and other aspects of its jurisdiction throughout the areas in question to the exclusion of the defendants. Without asking this Court to define the exact nature of its jurisdiction, the Rosebud Sioux Tribe does ask the Court to declare whether or not any of the three statutes in question operated to diminish the geographical territory over which the tribe is entitled to exercise this jurisdiction. Therefore, the question presented is: Did the Act of April 23, 1904 (33 Stat. 254, chap. 1484) or the Act of March 2, 1907 (34 Stat. 1230, chap. 2536) or the Act of May 30, 1910 (36 Stat. 448, chap. 260) remove the lands which each opened

to non-Indian settlement from the Rosebud Sioux Indian Reservation, thereby rendering those opened lands no longer "Indian country" as defined at 18 U.S.C. §1151 (a)?

In this brief we deal with the above three acts to show that they were not expressions of Congressional intent to diminish or alter the boundaries of the Rosebud Reservation. Rather, Congress intended only to allow non-Indians to take homesteads on these parts of the reservation in a manner consistent with the heavy moral obligations which the United States has imposed on itself in its dealings with its Indian wards. To show this, we rely on legislative and historical materials and on a line of federal cases, including Seymour v. Superintendent, 368 U.S. 351; 82 S.Ct. 424 (1962); City of New Town, N.D. v. United States, 454 F.2d 121 (8th Cir., 1972); and United States ex rel. Condon v. Erickson, (U.S.D.C.D.S.D., June 27, 1972, CIV71-17S), which construe other statutes with substantially identical language as not having diminished certain other reservations. The Supreme Court of South Dakota has endorsed this line of cases in South Dakota v. Molash, appeal #10959, opinion filed July 19, 1972.

The original establishment of an Indian reservation is much more than a grant of lands to a conquered people. To use a more descriptive phrase, along with the land goes a bundle of rights. One of these rights is the right of the Indians to govern themselves. Williams v. Lee, 358 U.S. 217; 79 S.Ct. 269 (1959); Organized Village of Kake v. Egan, 369 U.S. 60; 82 S.Ct.

562 (1962). Another such right is freedom from state jurisdiction. United States v. Kagama, 118 U.S. 375; 6 S.Ct. 1109 (1886); Seymour v. Superintendent, supra; Annis v. Dewey County Bank, 335 F.Supp. 133 (U.S.D.C.D.S.D., 1971). Another among the many possible rights within the bundle is the right to hunt and fish regardless of state licensing regulations. Menominee Tribe v. United States, 391 U.S. 404; 88 S.Ct. 1705 (1968); Puyallup Tribe v. Department of Game, 391 U.S. 392; 88 S.Ct. 1725 (1968). It is our position that the loss of one right, such as the right to occupy the land, does not necessarily jeopardize the other rights remaining in the bundle of rights as originally granted. For example, in the area of freedom from state criminal jurisdiction, the loss by the tribe of the land upon which a crime is committed does not deprive the Indian defendant of his right to be free from state criminal jurisdiction. Seymour v. Superintendent, supra; City of New Town, N.D. v. United States, supra; United States ex rel. Condon v. Erickson, supra.

The clearest example of this concept appears in Menominee Tribe v. United States, supra. When the Menominee Reservation was originally established, the Indians received a bundle of rights, including not only the right to occupy the land but also the right to hunt and fish freely. By the Menominee Indian Termination Act of 1954, 25 U.S.C. §§891-902, the entire Menominee Reservation was disestablished and destroyed. Nevertheless, the United States Supreme Court held that, although nothing at all was left of the reservation lands after the

termination act, at least one of the original rights in the bundle of rights was not destoryed by the act. That Court failed to find any Congressional intent to end the tribal rights to hunt and fish as originally granted. 391 U.S. at 412-413; 88 S.Ct. at 1711. Citing many cases discussed in this brief, the Court repeated that "The intention to abrogate or modify a treaty is not to be lightly imputed to the Congess." 391 U.S. at 413; 88 S.Ct. at 1711.

Our present position before this Court is similar. It is granted that Congress did intend to modify the treaty and act which established the Rosebud Reservation. However, Congress expressed this intent only in terms of allowing non-Indians to acquire certain lands from the tribe. There was no expression of Congressional intent to take more than the right to use and occupy some of the tribal lands from the original bundle of rights granted to the Rosebud Sioux when the reservation was established. Congress confirmed in the Rosebud Sioux Tribe the right to exercise jurisdiction, whatever the nature of that jurisdiction may be, over the area described in the Act of March 2, 1889. The three acts noted above did not affect this right. Thus, the Rosebud Sioux Tribe still enjoys this right and will continue to enjoy it until Congress directs otherwise.

ARGUMENT

I. It is well-settled that state civil and criminal jurisdiction does not extend to Indians on reservations.

Chief Justice John Marshall first enunciated the legal status of Indian tribes in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). He described Indian tribes as "domestic dependent nations" and characterized their relationship with the United States as that of a ward to his guardian. Ibid., at 17. With this portrayal in mind, the Supreme Court soon after considered the effect of state jurisdiction over reservation Indians and the degree to which such jurisdiction would impinge on the delicate relationship between the federal guardian and its Indian wards. In holding that the state of Georgia lacked jurisdiction, Chief Justice Marshall declared that

> The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, and with the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States. The act of the state of Georgia, under which plaintiff in error was prosecuted, is, consequently, void, and the judgment is a nullity. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832).

The Supreme Court further amplified and explained this absence of state jurisdiction in United States v. Kagama, 118 U.S. 375, 383-384; 6 S.Ct. 1109, 1114 (1886), in which the Court declared that

> These Indian tribes are the wards of the nation. They are communities dependent on the United States,--dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill-feeding, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises a duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.

As was noted by Felix S. Cohen, whom the Supreme Court described as "an acknowledged expert in Indian law" in Squire v. Capoeman, 351 U.S. 1, 8-9; 76 S.Ct. 611, 616 (1956), in his Handbook of Federal Indian Law, (G.P.O., 1942) p. 121,

> John Marshall's analysis of the basis of Indian self-government in the law of nations has been constantly followed by the courts for more than a hundred years. The doctrine set forth in this opinion [Worcester v. Georgia] has been applied to an unfolding series of new problems in scores of cases that have come before the Supreme Court and the inferior federal courts.

For modern applications of this well-established doctrine, see generally Williams v. Lee, 358 U.S. 217; 79 S.Ct. 269 (1959); Groundhog v. Keeler, 442 F.2d 674 (10th Cir., 1971); Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir., 1969); Littell v. Nakai, 344 F.2d 486 (9th Cir., 1965); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir., 1956).

II. The counties of Mellette and Tripp and parts of the counties of Gregory and Lyman were part of the original Rosebud Indian Reservation.

1. The Treaty of Fort Laramie, between commissioners especially appointed and authorized by the President, and the chiefs of the Sioux, Cheyenne, Arapahoe, Crow, Assinaboine, Gros-Ventre Mandan, and Arrickara Nations, was signed on September 17, 1851 and proclaimed by President Millard Fillmore at 11 Stat. 749. This treaty assigned the Sioux most of what is now southwestern South Dakota and northwestern Nebraska, including all of Mellette county, most of Tripp county, and part of Lyman county.

2. The rather tenuous reservation described in the Treaty of Fort Laramie was modified and enlarged by the Treaty with the Sioux and Arapahoe of 1868. It was signed by General William Tecumseh Sherman on behalf of the United States on April 29, 1868, ratified by Congress on February 16, 1869 (15 Stat. 635), and proclaimed by President Andrew Johnson on February 24, 1869. By this treaty, the Great Sioux Reservation was established. It encompassed all of the present state of South Dakota west of the east bank of the Missouri River, including all of the present counties of Mellette, Tripp, Gregory, and Lyman. This hugh tract was

> set apart for the absolute and undisturbed use and occupation of the Indians herein named.

3. The Great Sioux Reservation was diminished from its 1868 boundaries by the Act of March 2, 1889, chap. 405, 25 Stat. 888. This act reduced the Sioux lands to about half their former extent and explicitly restored the remainder to the public

domain, the United States purchasing some of the lost lands outright. Section 2 of this act explicitly

> se. apart for a permanent reservation for the Indians receiving rations and annuities at the Rosebud Agency, in said territory of Dakota (emphasis supplied)

an expanse of about three million acres of land which includes all of the counties of Mellette, Tripp, and Todd, that part of the county of Gregory west of the ninety-ninth degree of west longitude, and that part of the county of Lyman west of the west boundary line of Gregory county extended north and south of the White River. The statutory description of this tract is

> Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel to a point due south from the mouth of Black Pipe Creek; thence due north to the mouth of Black Pipe Creek; thence down White River to a point intersecting the west line of Gregory County extended north, thence south on said extended west line of Gregory County to the intersection of the south line of Brule County extended west; thence due east on said south line of Brule County extended to the point of beginning in the Missouri River, including entirely within said reservation all islands, if any, in said river.

III. This Court must consider four principles in determining whether the situs of an offense is "Indian country" for jurisdictional purposes.

The Eighth Circuit Court of Appeals has suggested the first, second, and fourth of the following four principles to be consider

in determining whether an Act of Congress operated to disestablish or diminish an Indian reservation in the recent case of City of New Town, N.D. v. United States, 454 F.2d 121, 125 (1972). These principles were noted and followed by the present Court in the very recent unreported case of United States ex rel. Condon v. Erickson, (U.S.D.C., D.S.D., CIV71-175), June 27, 1972.

A. Only Congress can diminish or alter the boundaries of an Indian Reservation.

In defining the term "reservation" and comparing it with the term "Indian country", the United States Supreme Court discussed both terms and held that

> when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress. United States v. Celestine, 215 U.S. 278, 282; 30 S.Ct. 93, 95 (1909).

This rule, as established in Celestine, that only Congress may disestablish or alter the boundaries of a reservation, is undoubtedly still good law. The United States Supreme Court, as recently as 1968, has cited Celestine as still the law "With respect to crimes committed by Indians within reservation boundaries". Puyallup Tribe v. Department of Game, 391 U.S. 392, 397, n. 11; 88 S.Ct. 1725, 1728, n. 11 (1968). That Court also cited and followed Celestine in Seymour v. Superintendent, 368 U.S. 351, 359; 82 S.Ct. 424, 429 (1962). The Eighth Circuit also regards Celestine as the law. In Beardslee v. United States, 387 F.2d 280, 285 (1967), that Court per Blackmun described this premise of Celestine as "established", quoted it verbatim, and

treated it as authoritative in deciding a jurisdictional question. The Eighth Circuit described this rule of Celestine as a "principle" and followed it in City of New Town, N.D. v. United States, supra, at 125. Also, in United States ex rel. Miner v. Erikson, 428 F.2d 623, 638 n. 11 (1970), Judge Lay, dissenting on other grounds in a case in which jurisdiction was not a issue, stated that

> The rule is firmly established under United States v. Celestine, 215 U.S. 278, 80 S.Ct. 93, 54 L.Ed. 195 (1909) that once the reservation is established all tracts remain within it until separated by Congress.

Thus, the viability of the rule in Celestine is beyond serious dispute under the decisions of the United States Supreme Court and those of the Eighth Circuit. The decisions in other circuits are in accord. Williams v. United States, 215 F.2d 1, 2 (9th Cir., 1954); Tooisgah v. United States, 186 F.2d 93, 97 (10th Cir., 1950). [1]

B. Courts will not lightly impute to Congress an intent to abridge or abrogate Indian treaty rights or statutory rights.

Because Indian tribes occupy a special position with respect to the United States, they have always been accorded a degree of special treatment in the federal courts. Chief Justice John Marshall described Indian tribes as "domestic

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[1] The Celestine doctrine has been codified in 25 U.S.C. §398(d).

dependent nations" and characterized their relationship with the United States as that of a ward to its guardian. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). An enunciation of the duty imposed on the United States and its courts in dealings with Indian tribes is found in Seminole Nation v. United States, 316 U.S. 286, 296-297; 62 S.Ct. 1049, 1054 (1942):

> Under a humane and self-imposed policy which has found expression in many acts of congress and numerous decisions of this Court, the United States has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Although the Congress does have plenary power over its Indian wards in general, Lone Wolf v. Hitchcock, 187 U.S. 553, 566; 23 S.Ct. 216, 221 (1903), the federal courts will not uphold any abridgement or abrogation of rights or benefits secured to a tribe by treaty or statute unless Congress has made it very clear that it really did intend to strip its wards of a right or benefit while the national honor was pledged to dealing "with perfect good faith towards the Indians". Ibid., 187 U.S. 566; 23 S.Ct. 221. As was declared by the Supreme Court in both Pigeon River Improvement Co. v. Cox, 291 U.S. 138, 160; 54 S.Ct. 361, 367 (1934) and Menominee Tribe v. United States, 391 U.S. 404, 413; 88 S.Ct. 1705, 1711 (1968),

> The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.

This principle was reaffirmed as recently as 1972 by the Eighth

Circuit Court of Appeals in City of New Town, N.D. v. United States, 454 F.2d 121, 125 and by this Court, per Nichol, in United States ex rel. Condon v. Erikson, supra.

C. Doubtful expressions in treaties and statutes dealing with Indian affairs will be construed in favor of the Indians.

As stated by Felix S. Cohen in his authoritative Handbook of Federal Indian Law, (G. P. O., 1942) at p. 37,

> A cardinal rule in the interpretation of Indian treaties is that ambiguities are resolved in favor of the Indians.

This general proposition was first declared by Chief Justice John Marshall in the classic case of Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) in which Marshall held that

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.

This rule of construction has been followed consistenly. For example, Chief Justice Stone stated, in Carpenter v. Shaw, 280 U.S. 363, 367; 50 S.Ct. 121, 122 (1930), that

> Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.

See also Choate v. Trapp, 224 U.S. 665, 675; 32 S.Ct. 565, 569 (1912); Winters v. United States, 207 U.S. 564, 576, 28 S.Ct. 207, 211 (1908); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866). The Court of Claims has applied this rule as recently

as 1972 in Hebah v. United States, 456 F.2d 696, 704.

This rule of construction applies not only to treaties and agreements with the Indians but also to statutes passed for their benefit. The Supreme Court has posited

> the settled rule that, as between the whites and Indians, the laws are to be construed most favorably to the latter.
> Red Bird v. United States, 203 U.S. 76, 94; 27 S.Ct. 29, 36 (1906).

That same Court repeated this edict in Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89; 39 S.Ct. 40, 42 (1918) when it reaffirmed

> the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.

D. The opening of an Indian Reservation to settlement by non-Indians is not inconsistent with its continued existence as a reservation.

In order to appreciate the significance of the seminal case of Seymour v. Superintendent, 368 U.S. 351; 82 S.Ct. 424 (1962), and its relation to the Rosebud Reservation, it is necessary to examine the historical background of the opening of the reservation in considerable detail. This historical digression is in order at this point to illustrate the thinking of Congress and to demonstrate the Supreme Court's understanding of this thinking in Seymour.

1. There was a great and unsatisfied demand by non-Indians for land to homestead.

Around the turn of the century, Congress was seeking both to fulfill its guardianship obligations toward its Indian wards and to accomodate the legitimate demands of non-Indians for land to homestead. By 1900 nearly all of the public domain which was suitable for agriculture had already been disposed of, but still the demand for homesteads far exceeded the supply of public land available for such purposes. For example, the Act of April 23, 1904 (33 Stat. 254, chap. 1484), which opened that part of the Rosebud Reservation in Gregory County west of 99 degrees west longitude to non-Indian settlers made available approximately 2412 homesteads of 160 acres each. About a quarter of a million people descended upon the local land offices at Bonesteel, Fairfax, Chamberlain, and Yankton and 106,308 of these completed applications to be eligible for a drawing for these 2412 homesteads. At the Yankton office, where 57, 434 applications were filed

> the crowds . . . broke all previous records. Hundreds slept in line at the land office, day and night, for a considerable time, to be in readiness to make their filings. On one day in July nearly seven thousand people were thus registered. It was estimated that nearly one thousand people were in line one morning at one time, having slept there all night. At 4 o'clock in the morning the lines were joined by 1,000 more until they extended one block and a half from one office and nearly as far . . . at another office. A carload of ready eatables came from Sioux City and was sold to the men waiting in line. The rush in the city and especially on the trains was something that had never been witnessed before in this state.
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> Charles Lowell Green, The Administration of the Public Domain in South Dakota, South Dakota Historical Collections, Vol. 20, p. 168 (1940).

For the surplus and unallotted lands on the Rosebud Reservation in Tripp County, a total of 114,769 persons endured great hardships to file for about 4000 homesteads in 1908. A similar crush occurred at the opening of the surplus and unallotted lands in Mellette County in 1911. Ibid.

2. The United States has a duty of exercising a very high standard of good faith in managing the affairs of its Indian wards.

On the other hand, the United States stands in a fiduciary relationship with its Indian wards. The standard of duty of the United States towards the Indian tribes has always been high, certainly high enough to preclude a dimunition of a tribe's reservation without a very strong showing that Congress did affirmatively intend to do so merely to benefit land-hungry non-Indians to whom the United States owed no such special duty of care. The United States Supreme Court declared this special duty toward Indians in United States v. Payne, 264 U.S. 446, 448; 44 S.Ct. 352, 353 (1924). That Court held that Indians

> are an unlettered people, unskilled in the use of language [citation], with regard to whom the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness.

The same Court required an even more stringent standard in Seminole Nation v. United States, 316 U.S. 286, 296-297; 62 S.Ct. 1049, 1054 (1924):

> Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the United States] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards

3. The United States had been pursuing a careful and conscious policy of assimilating Indians into the majority society.

In the discharge of this duty towards its Indian wards, the United States had been diligently pursuing a deliberate course of civilizing the Indians, educating them in the ways of the dominant white society, and especially encouraging them to abandon war and hunting as their main source of livlihood in favor of farming. Cohen states that

> the use of these lands which the Indians did not "need" for the advancement of civilization was a logical part of a whole and sincerely idealistic philosophy. The civilizing policy was in the long run to benefit Indian and white man alike.
> Cohen, Handbook of Federal Indian Law, (G.P.O., 1942) p. 209.

In 1918 the Supreme Court noted that

> The purpose of creating the [Metlakahtl] reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life.
> Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89; 39 S.Ct. 40, 42 (1918).

More recently the same Court has affirmed that

> Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society.
> Williams v. Lee, 358 U.S. 217, 220; 79 S.Ct. 269, 271 (1959).

The culmination of this policy was the General Allotment Act of February 8, 1887, 24 Stat. 388 25 U.S.C. §331 et seq. This act provided for allotments of 160 acres to heads of Indian families to be held in trust for them by the United States, a fee simple patent to be issued to each allottee at the expiration of the trust period, and citizenship to all allottees who had severed their tribal relations and had adopted "the habits of civilized life". Under this general act, 53,168 Indians received allotments totalling nearly 5,000,000 acres on their reservations between 1887 and 1900. Report of Commissioner of Indian Affairs (1916), pp. 53, 54. By the time that the surplus and unallotted lands on the reservation in the counties of Mellette, Tripp, Gregory and Lyman were opened to non-Indian settlers, each member of the Rosebud Sioux Tribe had already received his allotment. These allotments were scattered throughout the entire 1889 reservation. The Bureau of Indian Affairs allotment records indicate that, prior to the entry of any non-Indian, Indian allotments totalled approximately 486,770.14 acres of the 857,306.23 acres of Mellette county, or 57% of the land in that county; 404,610.62 acres of the 1,036,00 acres in Tripp county and the relevant part of Lyman county, or 39% of the total land in Tripp county and that portion of Lymar county originally within the Rosebud Reservation; and 115,014.58 acres of the approximately 520,000 acres, or 22% of the part of Gregory county within the original reservation. Had there been more Rosebud Sioux, presumably they, too, would have been allotted.

4. Contemporary history indicates that Congress did not intend the three acts to operate to diminish the Rosebud Reservation from its 1889 boundaries.

During the first years of this century, Congress was confronted with the conflicting demands of settlers for homesteads and of Indians for the faithful fulfillment of guardianship obligations. It had to deal with both of these legitimate demands in the light of its determined policy of amalgamating the Indian into the dominant society by promoting his education and civilization, and by transforming him from a hunter and warrior into a farmer. The Acts of April 23, 1904 (33 Stat. 254, chap. 1484), March 2, 1907 (34 Stat. 1230, chap. 2536), and May 30, 1910 (36 Stat. 448, chap. 260) were Congress' response to these conflicting demands for the Rosebud Reservation; they will be referred to in this brief as the "three acts" for convenience. By allowing non-Indians to homestead the vacant lands on the reservation after all the Indians had received their allotments, Congress not only made available land to land-hungry whites which would otherwise remain unoccupied and unproductive, but it also fostered the civilization and advancement of its Indian wards by sprinkling among them white homesteaders who would exemplify the habits and sense of individual initiative and self-reliance that Congress wished to instill in the Indians in the course of assimilating them into the dominant society. In order to earn their patents, the white homesteaders would not only set excellent examples of industriousness but would also teach their Indian

neighbors the skills of farming. And the presence of productive white farmers would enhance the value of the Indian allotments and also encourage railroads to extend their lines to serve these new farmers, and thereby further increase the value of the Indian holdings.

That Congress intended the three acts to operate as a unit in a deliberate effort to meet the genuine needs of the whites clamoring for land and of the Indians seeking improvement of their condition, is amply supported by the statements of Congressman Charles H. Burke, after whom the town of Burke, South Dakota is named, in the Congressional Record. While the bill to open the surplus and unallotted lands on the Rosebud Reservation in Mellette County to white settlers was under consideration by the House, Congressman Burke, author of all three acts, stated that

> [T]his bill is in line--in fact, almost a duplication--of bills that have heretofore passed and become law, proposing to dispose of surplus and unallotted lands of the different Indian reservations of the country. . . [T]here are two propositions to be considered in disposing of the unallotted and unused lands on Indian reservations. One is, at the earliest possible date, to get among the Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms . . . [This] will have the effect of civilizing the Indians who have allotments and also give value to these allotments which at present are of very little value . . . In addition to that, just as soon as these reservations are opened up and settled [,] railroads usually come in and thereby give greater value to the lands owned by the Indians.
>
> Congressional Record, House of Representatives, 61st Congress, 2nd Session, Vol. 45, pt. 5, pp. 5456, 5457. April 27, 1910.[2]

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[2] Burke's prediction that the introduction of white settlers would

Congressman Carter echoed these views when he spoke in support of a very similar bill (Act of May 29, 1908, 35 Stat. 460, chap. 218) to open the surplus and unallotted lands of the Cheyenne River Reservation in South Dakota to non-Indian settlement:

> Now, there is one proposition which should always be taken into consideration in the opening of an Indian reservation, and that is this, that prior

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f.n.2 (cont.)

make the area more attractive to railroad builders materialized on the Rosebud Reservation just as Burke imagined. As soon as the three acts opened the surplus and unallotted lands on that reservation in each of the counties of Mellette, Tripp, and Gregory to white settlers, a rail line was built soon after into the newly opened county. The Chicago & North Western Railway informs this office that in 1902, just two years prior to the opening of the surplus and unallotted lands in that part of the Rosebud Reservation in Gregory county, the Fremont, Elkhorn and Missouri Valley Railroad Company completed its line from Verdigre, Nebraska to Bonesteel, South Dakota in that part of Gregory county not within the 1889 Rosebud Reservation, less than three miles from the reservation border. When the surplus and unallotted lands on the reservation in Gregory county west of 99° west longitude were opened to settlers in 1904, the Chicago and North Western Railway purchased the line to Bonesteel and began extending it to Gregory, within the reservation, and completed construction in 1907. White settlers first entered the Tripp and Lyman county portions of the reservation in 1908, and the Chicago and North Western Railway immediately followed them, completing the line from Gregory in Gregory county to Winner in Tripp county in 1911. In the same year the first white settlers were permitted to enter the surplus and unallotted lands of the reservation in Mellette County, and the Chicago and North Western Railway dutifully began to extend its line into Mellette County after them. However, this last extension was considerably longer than any of the previous extensions and was interrupted by World War I and the ensuing shortages, so that this longer line to Wood in Mellette county was not completed until 1929. It should also be noted that only the Todd county portion of the Rosebud Reservation was never opened to non-Indian settlers and to this day Todd county had no railraod. Therefore, one may safely infer that the railroad almost immediately followed the white settlers to whatever surplus and unallotted lands of the reservation were opened, just as the chief architect of the three acts and Congress had in mind in drafting this legislation.

> to the time of the opening of that reservation the lands are not worth near so much money as they are after the farmers begin to come in, settle, and build homes.
>
> That is what makes the land valuable . . . when they do come in this land will be improved, and as it is improved it will increase in value all the land on what is now the reservation, including the allotments of the Indians who now own the land. As the land around each Indian's allotment is improved and put in a higher state of cultivation just in that proportion will the Indian's original allotment increase in value and be made more productive . . . For that reason, Mr. Speaker, I intend to give my sanction to the bill by voting for it . . . and thereby keep the plighted faith of the Federal Government with its helpless wards. (Applause)
>
> Congressional Record, House of Representatives, 60th Congress, 2nd Session, p. 7006. May 26, 1908.

It was with these historical factors presumably in mind that the United States Supreme Court considered the case of Seymour v. Superintendent, 368 U.S. 351; 82 S.Ct. 424 (1962). The question presented in that case was whether the Act of March 22, 1906, 34 Stat. 80, chap. 1126, which opened the surplus and unallotted lands on the Colville Reservation in Washington to non-Indian settlers, would operate to disestablish that reservation and render it no longer "Indian country" for jurisdictional purposes. This act is substantially identical to the Act of June 1, 1910, 36 Stat. 455, chap. 264, considered in City of New Town, N.D. v. United States, supra, and to the three acts, as will be shown below. In reaching its decision in Seymour, the Court specifically noted:

> a. "this country's relationship to its Indian wards" 368 U.S. at 354; 82 S.Ct. at 426

b. that a previous act (Act of July 1, 1892, 27 Stat. 62, chap. 140) had expressly restored a portion of the Colville Reservation to "the public domain" 368 U.S. at 355; 82 S.Ct. at 427

c. that the instant Colville Act had not expressly restored any of the Colville Reservation "to the public domain" 368 U.S. at 355; 82 S.Ct. at 427.

d. the rule of Celestine, 368 U.S. at 359; 82 S.Ct. 429

The Court's decision, presumably made with the above historical circumstances in mind, was that the Colville Act, in opening the surplus and unallotted lands on that reservation to non-Indian settlers, did not expressly disestablish or diminish the Colville Reservation, and that, because it had not do so expressly, it had not done so at all. On the contrary, the Court held that the opened lands were still part of the reservation and therefore still "Indian country" for jurisdictional purposes. 368 U.S. at 355; 82 S.Ct. 427. The Colville Act, when viewed in the light of the conflicting Indian and non-Indian demands for the disposition of the vacant lands,

> did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards. 368 U.S. at 356; 82 S.Ct. at 427.

IV. Judicial interpretation of the three acts is governed by certain federal decisions rather than by the decisions of the South Dakota Supreme Court.

A. The decisions of federal courts prevail over those of state courts in the interpretation of a federal statute.

It is beyond serious doubt in this federal system of government that a state's courts are the authoritative interpreters of that state's statutes, subject only to that state's constitution and the federal constitution, statutes, and treaties. It is equally beyond question that the federal courts are the authoritative interpreters of federal statutes, subject only to the federal constitution. United States v. Gilbert Associates, Inc., 345 U.S. 361, 363; 73 S.Ct. 701, 703 (1953).

B. Certain recent federal decisions govern the interpretation of federal statutes such as the three acts.

The federal case of Seymour v. Superintendent, 368 U.S. 351; 82 S.Ct. 424 (1962) is the definitive federal holding concerning the proper interpretation of a federal act opening the surplus and unallotted lands on an Indian reservation to non-Indian settlers. This case dealt with an appeal from a state court decision which denied that the state lacked jurisdiction to prosecute the petitioner. The petitioner claimed that jurisdiction was exclusively federal under 18 U.S.C. §1153 since the situs of the offense was within

"Indian country" as defined by 18 U.S.C. §1151. In construing the Colville Act, the language of which is substantially identical to the language of the three acts, the Supreme Court held that the Colville Act did not disestablish or diminish the reservation so opened. This is precisely the question in the instant case; thus, Seymour should govern the construction of the three acts.

Implementing and elaborating on Seymour is the recent case of City of New Town, N.D. v. United States, 454 F.2d 121 (8th Cir., 1972), in which the Eighth Circuit considered exactly the same claim as in Seymour for the Fort Berthold Reservation in North Dakota. That Court applied the principles of Seymour to a 1910 statute, the language of which is also substantially identical to the language of the Colville Act and the three acts. Following the reasoning of Seymour, the Court held that the 1910 statute (Act of June 1, 1910, 36 Stat. 455, chap. 264) did not alter the boundaries of or diminish the Fort Berthold Reservation.

In construing a federal statute, substantially identical to the Colville Act construed in Seymour, in Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001 (U.S.D.C.,D.Minn., 1971), Judge Devitt analyzed the federal statute in terms of the principles set forth in Seymour and held that the instant statute did not disestablish the Leech Lake Reservation and that

> its purpose was not to terminate the reservation or end federal responsibility for the Indian but rather to permit the sale of certain of his lands to homesteaders and others.
> 334 F.Supp. 1005.

Applying both Seymour and New Town is the very recent case

case of United States ex rel. Condon v. Erickson, (U.S.D.C., D.S.D., June 27, 1972) in which the present Court interpreted the federal statute (Act of May 29, 1908, 35 Stat. 460, chap. 218) which opened the surplus and unallotted lands of the Cheyenne River Reservation to non-Indian settlers. The Court held that, at least under New Town, the act in question had not operated to disestablish or diminish the Cheyenne River Reservation and that reservation was therefore still "Indian country" for jurisdictional purposes. The Rosebud Sioux Tribe makes the same claim for its reservation regarding the three acts: since the language of the acts considered in Seymour, New Town, and Condon is substantially identical to the language of the three acts, those three acts must also have not altered the boundaries of the Rosebud Reservation.

C. The decisions of the Supreme Court of South Dakota have been superseded by recent federal decisions and are no longer applicable.

The South Dakota Supreme Court has often grappled with Indian jurisdictional questions such as the one presented in the instant case. Such state decisions would be entitled to considerable weight in the absence of authoritative guidance from the federal courts in the interpretation of the federal statutes. These state decisions include State v. Sauter, 205 N.W. 25 (1925); Application of DeMarrais, 91 N.W.2d 480 (1958); State ex rel. Hollow Horn Bear v. Jameson, 95 N.W.2d 181 (1959); State v. DeMarrais, 197 N.W.2d 225 (1961);

State v. Barnes, 137 N.W.2d 683 (1965); Lafferty v. State, 125 N.W.2d 171 (1963); and Wood v. Jameson, 130 N.W.2d 95 (1964). However, the interpretations accorded to federal statutes in these cases have been superseded by authoritative and conflicting interpretations in Seymour, New Town, Beardslee, and Condon, supra. The first four of these cases rely on interpretations of federal statutes, which interpretations have been superseded by the construction of substantially identical statutes in Seymour, New Town, and Condon, supra. Both DeMarrais cases and the Hollow Horn Bear case relied on an interpretation of 18 U.S.C. §1151(c) which has been ruled incorrect in Beardslee, supra. This error and an untenable attempt to distinguish Seymour are the basis of Lafferty. Only Barnes and Wood mention Seymour. The latter baldly asserts, without any support whatever, that

> we think it was the purpose of Congress to disestablish the reservation and restore to the public domain the lands therein . . .
> 130 N.W.2d 99.

Barnes relies on Lafferty, and an equally untenable distinction from Seymour. Also, the more recent cases of Smith v. Temple, 152 N.W.2d 547 (1967) and Kain v. Wilson, 161 N.W.2d 704 (1968) are inapplicable because they deal with jurisdiction over parts of South Dakota reservations which have never been opened to non-Indian settlement.

For the above reasons, these cited decisions of the South Dakota Supreme Court, which attempt to interpret federal statutes for jurisdictional purposes, are inapplicable to the instant interpretation of the three acts.

D. The decisions of the South Dakota Supreme Court have yielded to recent federal interpretations of statutes similar to the three acts.

In South Dakota the spell of the inapplicable or incorrect state supreme court decisions has broken. Judge Hersrud, in unreported circuit court opinions in State v. Mongram and State v. Molash, Eighth Judicial Circuit, Feb. 10, 1971, held that the state lacked jurisdiction over an Indian defendant for a crime, the situs of which was a part of the Standing Rock Reservation which was opened to non-Indian settlement under a federal statute substantially identical to the acts in Seymour, New Town, and Condon. Judge Hersrud concluded that

> this Court holds that Seymour v. Superintendent, 368 U.S. 351, overrules the case law in South Dakota. Our case law holds the more sensible and practical solution to the question of jurisdiction and this Court reluctantly finds it to be superseded by the above cited and other cases.

On July 19, 1972 the South Dakota Supreme Court unanimously affirmed Judge Hersrud. It held that under both Seymour and New Town the statute in question (Act of February 14, 1913, 37 Stat. 675, chap. 54).

> did not disestablish that part of the Standing Rock Reservation embracing the City of McLaughlin, South Dakota, and that the trial court correctly concluded that the state is without jurisdiction over the defendant for the offense charged.
> [case #10959, the full text of which will be found in the appendix]

V. Those chiefly responsible for the administration of the three acts do not regard the three acts as having diminished the Rosebud Reservation.

A. Various Presidential proclamations indicate that at least two Presidents have interpreted the three acts not to have diminished the Rosebud Reservation.

As they were specifically directed by the three acts, Presidents Roosevelt and Taft issued proclamations prescribing the mechanisms by which the surplus and unallotted lands opened to non-Indian settlement by the three acts would be made available to homesteaders. That President Taft, as the chief executive of the United States, the guardian of the Rosebud Sioux, contemplated an undiminished Rosebud Reservation is clearly indicated by the terms of his proclamation of June 29, 1911 (37 Stat. 1691, reproduced in full in the appendix):

> I, WILLIAM H. TAFT, President of the United States of America, by virtue of the power and authority vested in me by the Acts of Congress approved May 27, 1910 (36 Stat. 440) and May 30, 1910 (36 Stat. 448), do hereby prescribe, proclaim and make known that all the non-mineral, unallotted, unreserved lands within the Pine Ridge and Rosebud Reservations in the State of South Dakota . . . shall be disposed of under the general provisions of the homestead law of the United States . . . [emphasis supplied]

President Theodore Roosevelt also contemplated an undiminished Rosebud Reservation when he issued his proclamation of August 24, 1908 (35 Stat. 2203, reproduced in full in the appendix) stating that

> . . . by the Act approved March 2, 1907 (34 Stat. 1230), the Congress directed that all that part of the Rosebud Reservation [description] be disposed of under the general provisions of the homestead laws of the United States . . . [emphasis supplied]

President Roosevelt also proclaimed the opening of the surplus and unallotted lands in Gregory County on May 13, 1904 (33 Stat. 2354, reproduced in full in the appendix). He employed language in that proclamation which nearly duplicated the language which Congress used in the Act of April 23, 1904. From this language, one might infer that Roosevelt did contemplate a diminished Rosebud Reservation. However, that act contains internal inconsistencies which render it subject to the rule that ambiguities in statutes passed for the benefit of Indian tribes be resolved in the tribes' favor, as will be shown below. Thus, Roosevelt's identical language in this proclamation should be equally subject to this rule.

B. The Secretary of the Interior has interpreted the three acts as not having diminished the Rosebud Reservation.

When the Rosebud Sioux Tribe submitted a proposed tribal constitution to the Secretary of the Interior for his approval pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 25 U.S.C. §476 et seq.), the Secretary approved the constitution on December 16, 1935 containing the following article:[3]

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[3] A certified copy of this constitution will be found in the appendix.

Article I - Territory

> The jurisdiction of the Rosebud Sioux Tribe of Indians shall extend to the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889, and to such other lands as may hereafter be added thereto under any law of the United States, except as otherwise provided by law.

Thus, the Secretary of the Interior joined the Rosebud Sioux Tribe in regarding the Rosebud Reservation as undiminished by the three acts. Since this officer is chiefly responsible for administering the federal trust relationship on Indian reservations, his implicit interpretation of the three acts is entitled to "great weight" and "is not to be overturned unless clearly wrong . . .". United States v. Jackson, 280 U.S. 183, 193, 50 S.Ct. 143, 146 (1930); Stevens v. Commissioner, 452 F.2d 741, 746 (9th Cir., 1971).

C. The Field Solicitor for the Bureau of Indian Affairs regards the three acts as not having altered the boundaries of the Rosebud Reservation.

Wallace G. Dunker, Field Solicitor of the Bureau of Indian affairs, issued a memorandum, dated April 6, 1972, to the Area Director of the Bureau advising that, in his opinion, the present boundaries of the Rosebud Reservation remain as they were established by the Act of March 2, 1889. This memorandum is reproduced in full in the appendix. It concludes that

> the three Acts of Congress cited above ". . . did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and

> trustees for the Indians, regarded as beneficial to the development of its wards . . ." as the court stated in Seymour v. Superintendent. Clearly revealing the intent of Congress, the title to the 1907 and 1910 Acts declared the purpose to be "To authorize the sale and disposition of a portion of the surplus and unallotted lands . . .", and the provisions thereof set forth the necessary details at the same time reserving rights to the Indians to which they are entitled by treaty or agreement.
>
> Accordingly, it is my opinion that pursuant to applicable legal principles, the legal boundaries of the Rosebud Indian Reservation have not been diminished or altered by Congress since the establishment of the original boundaries thereof by the Act of March 2, 1889, 25 Stat. 888, which are described above.

Since the Bureau of Indian Affairs is the branch of the Department of the Interior chiefly charged with the

> management of all Indian affairs and of all matters arising out of Indian relations
> 25 U.S.C. §2

the opinion of its field solicitor is also entitled to "great weight" and is also "not to be overturned unless clearly wrong, or unless a different construction is plainly required." United States v. Jackson, supra.

VI. Since the plain language of the three acts is substantially identical to the plain language of the acts considered in Seymour, New Town, and Condon, this Court must adhere to the principles of these cases in interpreting the three acts.

A. The plain language of the three acts is substantially identical to the plain language of the acts considered in Seymour, New Town, and Condon.

For ease of reference, the following acts will be referred

to herein by the following names:

a. Act of March 22, 1906, 34 Stat. 80, chap. 1126 - Seymour Act (Colville Reservation, Washington)

b. Act of June 1, 1910, 36 Stat. 455, chap. 264 - New Town Act (Fort Berthold Reservation, North Dakota)

c. Act of May 29, 1908, 35 Stat. 460, chap. 218 - Condon Act (Cheyenne River Reservation, South Dakota)

d. Act of April 23, 1904, 33 Stat. 254, chap. 1484 - Gregory County Act

e. Act of March 2, 1907, 34 Stat. 1230, chap. 2536 - Tripp County Act [including part of Lyman County]

f. Act of May 30, 1910, 36 Stat. 448, chap. 260 - Mellette County Act

1. Title

Of the above six acts, all but the Gregory County Act explicitly state in their titles that their purpose is the sale and/or disposition of some of the surplus and unallotted lands on the reservation. The Gregory County Act differs from the other five acts in that it is the first and it alone is a Congressional ratification of an agreement previously entered into in 1901 between a United States Indian Inspector and the Rosebud Sioux Tribe. The operative language of this 1901 agreement is:

> The said Indians belonging to the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota. [description]
> Congressional Record, House of Representatives, 58th Congress, 2nd Session, p. 1422; January 30, 1904.

The Gregory County Act incorporates this language verbatim, as it does the entire text of the 1901 agreement. However, when Congress incorporated the inspector's three-year-old language into the Gregory County Act, it clearly did not intend that the act would be an outright purchase of the tribe's entire interest, but rather that the United States would act only as trustee and agent for the tribe in disposing of some tribal lands to settlers; the United States bound itself only to purchase school lands and try to find buyers for the other relinquished lands, even though the language of the agreement was taken from a time when a completely different policy prevailed in Indian land acquisitions. This change in Congressional policy is explicitly noted in Report No. 443 on H. R. 10418, House of Representatives, 58th Congress, 2nd Session, January 21, 1904, p. 2. This report was authored by Congressman Burke of South Dakota, who was also the author of the three acts. Burke states that:

> Both of these bills [i.e., both the House and Senate versions] present a new idea in acquiring Indian lands, and if this bill should be enacted into law it will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians

and pay them therefor and then open the same to entry and settlement . . .

> This bill provides that the lands shall be disposed of under the homestead laws by the settler paying therefor and the proceeds paid to the Indians, and it is expressly provided by Section 6 of this bill that the United States shall in no manner be bound to purchase any portion of the land except the school sections, or dispose of the same except as provided, or to guarantee to find purchasers for said lands, it expressly stating that the intention of the act is that the United States shall act as trustee for the Indians in disposing of the lands and pay over the proceeds from the sale thereof only as the same are received.

Thus, it is clear that, although the Gregory County Act does employ some language to the effect that the United States was purchasing a tract of land outright for a consideration with the tribe retaining no interest, this was not the case. Congress actually had just abandoned this policy in favor of a policy whereby the United States acted merely as trustee for the sale of the lands for the Indians, with the proceeds of the sale being paid to the tribe only if and when actually received from the homesteaders, instead of the United States paying the Indians a lump sum immediately and then trying to find buyers to recover the purchase price. As Burke stated, the Gregory County Act would establish a new policy, the refinements of which had yet to be made. Certainly Congress can be excused for employing language suggested by another and echoing an abandoned policy in its very first attempt to implement a new policy; the titles of each of the other five acts mentioned above indicate that this Congressional confusion was only monetary and that the "sell and dispose" formula really expressed Congress' true intent after it

realized that the outdated "cede, surrender, grant, and convey" formula was no longer appropriate. This is especially evident when, instead of paying the Lower Brule Sioux a cash sum immediately as the consideration for their land as had uniformly been done under the previous policy, Article II of the Gregory County Act stipulated that:

> In consideration of the land ceded, relinquished, and conveyed by article one of this agreement, the United States stipulates and agrees to dispose of the same to settlers under the provisions of the homestead and townsite laws, except sections sixteen and thirty-six, or an equivalent of two sections in each township, and to pay to said Indians the proceeds derived from the sale of said lands . . .

At the very most, Congress exhibited an understandable ambivalence and confusion in the Gregory County Act over exactly what language would be most appropriate to express the terms of the new land acquisition policy. The legislative history dispels the confusion on this point. In addition, the archival memoranda review the above language of the act subject to the rule, noted on page 8 of this brief, that doubtful expressions in treaties and statutes dealing with Indian affairs must be resolved in favor of the Indians. Therefore, Congress had exactly the same plan in mind in dealing with the lands of its Indian wards in all of the above six acts, even though it used inappropriate language in its first statutory attempt to implement this plan.

2. Lands exempted from sale and/or disposition

The Seymour Act specifically reserved from sale or

disposition the following categories of land:"

1. mineral lands ($3)

2. town site lands ($11)

3. lands necessary to provide sites for the Indian agency, Indian school, religious missions, sawmills, and gristmills, up to 480 acres ($7)

4. timber lands ($5)

5. irrigation project lands ($12)

The New Town Act made the following reservations from the lands to be sold and disposed:

1. coal and other mineral lands ($1)

2. town site lands ($6)

3. lands necessary to provide sites for the Indian agency, Indian school, and religious missions ($3)

4. tribal forest reserve ($10)

5. power or reservoir sites ($5)

6. demonstration farm site, up to 640 acres ($4)

7. a site sufficient to preserve the ruins of the Fort Berthold Indian village and burial grounds ($3)

8. school sections ($8)

The Condon Act made similar reservations from sale and disposition for the following purposes:

1. coal lands ($3)

2. town site lands ($5)

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4 The Seymour Act refers to the "diminished" reservation. The word "diminished" in this act refers to the fact that part of the original Colville Reservation was expressly "vacated and restored to the public domain" by the Act of July 1, 1892, 27 Stat. 62, chap. 140. The Seymour Act deals with the Colville Reservation as diminished by this earlier act.

3. lands necessary to provide sites for the Indian agency, Indian school, and religious missions ($1)

4. school sections ($1)

The Gregory County Act reserved the following classes of land from sale to settlers:

1. 398.67 acres for a subissue station, an Indian day school, one Catholic mission, and two Congregational missions ($2)

2. school sections ($4)

The Tripp County Act made similar exemptions for land for these purposes:

1. town site lands ($4)

2. school sections ($6)

The Mellette County Act reserved from sale and disposition land for the following purposes:

1. town site lands ($3)

2. school sections ($8)

3. lands necessary to provide sites for the Indian agency, Indian school, and religious missions ($1)

3. Prior allotment of Indians

Each of the six acts named above, except the Gregory County Act, specifically provides in its second section for some sort of allotment of Indians prior to the entry of the first non-Indians. The Seymour Act provides for an additional 80 acres to all. The New Town Act specifies either 160 acres of agricultural land or 320 acres of grazing land to all. The Condon Act requires that all unallotted Indians be allotted. The Tripp County Act provides allotments of 160 acres to all unallotted children of a Rosebud Sioux parent. And the Mellette

County Act requires that all allotments in that county be completed prior to the arrival of the first whites. The Gregory County Act makes no mention of prior allotment, perhaps because the question had not occurred to a Congress preoccupied with its first attempt to draft a statute under the new land disposal policy.

4. In lieu Indian allotments

The New Town, Condon, Tripp, and Mellette Acts each contain a special provision allowing any Indian who has an allotment on a portion of the reservation to be opened to non-Indians to relinquish that allotment and accept an in lieu allotment on the unopened portion of the reservation. These provisions are found in §1 of the New Town Act, §2 of the Condon Act, §2 of the Tripp County Act, and §1 of the Mellette County Act. No such provisions appear in either the Seymour or Gregory County Acts. However, one would not expect to find such a clause in the Seymour Act because that act opened the entire reservation to non-Indians, leaving no unopened portion of the reservation in which a Colville Indian could accept an in lieu allotment. Instead of providing for in lieu allotments, Article IV of the Gregory County Act guarantees that all allottees "shall enjoy the undisputed and peaceable possession their allotted lands . . .".

5. Price and sales

Each of the six statutes noted above prescribe a precise method by which the prices of the opened lands would be set and a schedule according to which payments would be made by

the homesteaders. The Gregory County (§2) and Tripp County (§3) Acts set specific prices for the land without regard for location on a scale which dropped over time. Each of the other four acts provided for a commission to be appointed to classify and appraise the lands to be opened according to location and quality. The land would be sold at its appraised value, one-fifth down, the remainder in five equal payments over either five or six years. The language employed to describe this process is nearly identical in the Seymour, New Town, Condon, and Mellette County Acts.

6. Forfeiture of all interest by entrymen for non-payment

Section 3 of the Seymour Act, §9 of the New Town Act, §4 of the Condon Act, §2 of the Gregory County Act, §3 of the Tripp County Act, and §6 of the Mellette County Act all contain substantially the following provision regarding forfeiture of all interest by entrymen who fail to satisfy their payment schedules:

> In case any entrymen fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry cancelled

and the lands be again subject to entry.

7. Commutation of entries

Each of the six acts noted above, except the Seymour Act, contains the following proviso, in §9 of the New Town Act, in §4 of the Condon Act, in §2 of the Gregory County Act, in §3 of the Tripp County Act, and in §6 of the Mellette County Act:

> nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made.

The Seymour Act contains no such proviso.

8. Disposition of unsold lands

Each of the six acts under consideration made similar provisions for the disposition of lands opened but not sold to entrymen after at least four years from the date of opening.

Section 3 of the Seymour Act directs that these lands be sold to the highest bidder for cash after five years for at least one dollar per acre. Any lands remaining unsold after ten years would be sold to the highest bidder for cash at whatever price they would bring. Section 3 of the Tripp County Act makes exactly the same provision, except its dates are four and seven years, respectively, and the minimum price after four years is $2.50 per acre.

Section 9 of the New Town Act, §4 of the Condon Act, and §6 of the Mellette County Act all identically provide that all opened lands not sold after four years may be reappraised and sold at the new appraised price, at the discretion of the Secretary of the Interior. Section 4 of the Condon Act additionally provides that all lands still unsold after seven years be sold to the highest bidder for however much cash they would fetch.

The Gregory County Act, in its second section, would sell all remaining lands after four years for cash, with no more than one section per buyer.

9. Veterans' rights

Section 2 of the Condon, Gregory County, Tripp County, and Mellette County Acts, section 4 of the Seymour Act, and section 9 of the New Town Act all contain the following identical guarantee of veterans' rights:

> the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

10. Details of opening

Section 3 of the Seymour Act, section 9 of the New Town Act, and sections 2 of the Condon, Gregory County, Tripp County, and Mellette County Acts all specify that the surplus and unallotted lands be opened under the terms of a Presidential proclamation

> which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation.

11. Disposition of net proceeds of land sales

Each of the six acts noted above makes careful provision for the net proceeds of the sale of the surplus and unallotted lands to be deposited in the United States Treasury in accounts established in the names of the various tribes. The acts differ only in particulars, such as whether the account will bear interest, whether Congress or the Secretary of the Interior shall draw on the account, and whether there are any restrictions

on what these funds may be used to purchase. Every one of the six acts requires that the net proceeds be spent exclusively for the benefit of the respective tribes.

Section 6 of the Seymour Act established an account without interest for the Colville Indians and authorized the Secretary of the Interior to expend this account "for the comfort, benefit, and improvement of said Indians".

Section 11 of the New Town Act established an account bearing 3% interest for the Fort Berthold Tribe and subjected this account "to appropriation by Congress for their education, support, and civilization."

The Secretary of the Interior was empowered by Section 6 of the Condon Act to draw on the account of the Cheyenne River Sioux Tribe, which account bore 3% interest, "for their benefit".

Article III of the Gregory County Act specified in great detail how this account would be spent over time, partly to purchase specified numbers and grades of cattle for the tribe, partly to be distributed on a per capita basis.

The fifth section of the Tripp County Act divided the net proceeds of this land sale into two funds: one, of $1,000,000, would bear 3% interest for ten years and would eventually be distributed per capita; the second would be any amounts over the $1,000,000 and would be spent by the Secretary of the Interior "for their benefit".

Section 7 of the Mellette County Act simply established a 3% account subject to Congressional appropriation "for their education, support, and civilization".

12. Role of the United States

All of the six acts being compared herein, except the Seymout Act, contain the following critical disclaimer of responsibility by, and enunciation of the role of, the United States:

> That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided[.]

The Seymour Act contains the same clause in slightly abbreviated form. These clauses are found in §9 of the Seymour Act, §14 of the New Town Act, §9 of the Condon Act, §6 of the Gregory County Act, §8 of the Tripp County Act, and §11 of the Mellette County Act.

These identical clauses in each of the six above acts make it indisputable that the United States was acting only as the trustee of the Indians for the disposition of some of their lands. The United States acquired nothing under the acts except the right of use and occupancy that had formerly resided in the tribes, so that the United States might convey this right of occupancy to entrymen. Since this was explicitly a trust relationship, beneficial title to all the opened lands remained in the tribes, until and unless the entrymen perfected their entries, or until and unless some other disposition was

made. See 43 U.S.C. §161 et seq. Only upon the issuance of a patent to the entryman would the legal title of the United States and the beneficial title of the tribe merge and pass a fee simple to the entryman. Thus, none of the six acts expressly deprived the tribes of their beneficial interest in the opened lands; the Indian title to these lands would never be extinguished if the lands were not disposed of. See generally Ash Sheep Co. v. United States, 252 U.S. 159, 164: 40 S.Ct. 241, 242 (1920); Morrison v. Work, 266 U.S. 481; 45 S.Ct. 149 (1925); Minnesota v. Hitchcock, 185 U.S. 373, 394-395; 22 S.Ct. 650, 658 (1902); Felix S. Cohen, Handbook of Federal Indian Law, (G.P.O., 1942) pp. 334-336. Surely the prospect of lingering Indian title is incompatible with the notion of a diminished reservation.

The Act of March 2, 1889, which explicitly restored much of the Great Sioux Reservation of the Treaty of 1868 to the public domain and divided the remainder into six separate reservations, contains no such clause limiting the role of the United States to that of trustee and disclaiming and promise on the part of the United States to buy any land not sold to settlers. On the contrary, Section 21 of the Act of March 2, 1889 expressly bound the United States to purchase any and all lands in the former portion of the reservation which remained unsold ten years after the opening of those lands.

13. Appropriations

Each of the six acts under consideration makes similar appropriations to cover the costs of the projects undertaken.

The Seymour Act is the only act under consideration which did not provide for school sections to be granted to the state; consequently, it is the only one of the six acts not to appropriate some amount to pay for such lands. The other five acts make the following appropriations to pay for school sections granted to the states:

New Town Act ($12)	$100,000
Condon Act ($8)	$225,000
Gregory County Act ($5)	$ 75,000
Tripp County Act ($7)	$165,000
Mellette County Act ($9)	$125,000

In addition to these appropriations, the four acts which set the price of the land by appraisal appropriate a sum to pay the costs of the survey, appraisal, and classification. The following acts appropriate these sums for these purposes:

Seymour Act ($10)	$ 75,000
New Town Act ($12)	$100,000
Condon Act ($8)	$ 75,000
Mellette County Act ($9)	$ 35,000

The Gregory County and Tripp County Acts make no such appropriation because the price of the lands in those areas are set by statute over time rather than by appraisal. Also, the New Town Act ($4) appropriates $25,000 to pay for the demonstration farm.

14. Preservation of Indian rights

Of the six acts noted above, all but the Seymour Act contain a crucial clause guaranteeing the preservation of Indian rights, substantially identical to the following:

> . . . nothing in this act contained shall be construed to deprive said Indians of the Fort Berthold Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this act.

This clause is found in §14 of the New Town Act, §9 of the Condon Act, Article V of the Gregory County Act, §8 of the Tripp County Act, and §11 of the Mellette County Act. Only the Seymour Act lacks such a clause and, in spite of this omission, the Supreme Court still interpreted that act as not having diminished the Colville Reservation. In this respect, the other five acts present even stronger cases for undiminished reservations, since one of the prime benefits to which a tribe is entitled is surely that of a secure reservation with a fixed boundary. The Treaty with the Sioux and Arapahoe was signed by General William Tecumseh Sherman for the United States on April 29, 1868, was ratified by Congress on February 16, 1869 (15 Stat. 635), and was proclaimed by President Andrew Johnson on February 24, 1869. Article 2 of this treaty

> set apart for the absolute and undisturbed use and occupation of the Indians herein named

all of the present state of South Dakota west of the east bank of the Missouri River and part of what is today southern North Dakota. This was the Great Sioux Reservation which was diminished from its 1868 boundaries by the Act of March 2, 1889 to include all of the present counties of Todd, Mellette, and Tripp, and the parts of the counties of Lyman and Gregory noted above for the Rosebud Sioux. Section 2 of the Act of March 2, 1889 set these lands apart as

> a permanent reservation for the Indians receiving rations and annuities at the Rosebud Agency. (emphasis supplied)

Unless the defendants can point to some Act of Congress which clearly expressed a Congressional intent to diminish the Rosebud Reservation and thereby abrogate the tribe's right to an undiminished and secure reservation, that reservation exists today just as it did on March 2, 1889.

Congress is certainly capable of making its intent clear to disestablish a reservation and restore it to the public domain. It did so once in the Act of July 1, 1892 which diminished the Colville Reservation when it

> expressly vacat[ed] the South Half of the reservation and restor[ed] that land to the public domain. Seymour v. Superintendent, 368 U.S. 355, 82 S.Ct. 427

Congress made its intent to diminish the reservation clear when it declared, in Section 21 of the Act of March 2, 1889:

> That all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain . . . (emphasis supplied)

Had Congress wished to diminish the Rosebud Reservation it could have employed language calculated to express such a wish clearly, as it had done previously. In view of:

1. the three specific provisos in the three acts preserving treaty benefits, such as an undiminished reservation,

2. the general principle that Indian treaty rights will be abrogated only by unequivocal Congressional language, and

3. the demonstrated capacity of Congress to use unequivocal language to disestablish a reservation and restore it to the public domain,

the failure of Congress to use such unequivocal language in any of the three acts cannot be considered inadvertant; these three factors can only be interpreted to mean that Congress did not intend that any of the three acts would disestablish or diminish the Rosebud Reservation.

In addition, the language of the Seymour Act which the Supreme Court expressly cites as evidence that Congress did not intend to diminish the Colville Reservation is nearly duplicated in the language of the three acts. That Court specifically cites Sections 2, 3, 6, and 12 of the Colville Act for this purpose in 368 U.S. 555, n. 11; 82 S.Ct. 427, n. 11. The language of the Seymour Act that the Supreme Court cites in support of an undiminished Colville Reservation consists of such phrases as "on said Colville Indian Reservation" (§2), "of the said . . . Colville Indian Reservation" (§3), "on the Colville Indian Reservation" (§6), and "of said . . . Colville Indian Reservation" (§12). Much the same language will be found in each of the three acts. The Gregory County Act includes such phrases as "of the Rosebud Indian Reservation", "on said reservation", "upon the reservation", and "upon said reservation", all in Article IV. The Tripp County Act uses language such as "within the Rosebud Reservation" (§2), "within said reservation" (§), "on the Rosebud Reservation" (§2), and "on the Rosebud Reservation" (§5). And the Mellette County Act employs phrases such as "on said reservation" (§1), "of the said Rosebud Reservation" (§2) "of the reservation" (§4), and "on the said reservation" (§7).

Therefore, since the United States Supreme Court cites the above language of the Seymour Act in support of the proposition that

> the 1906 [Seymour] Act repeatedly refers to the Colville Reservation in a manner which makes it clear that the intention of Congress was that the reservation should continue to exist as such . . . (368 U.S. 355; 82 S.Ct. 427),

then the nearly identical language in the three acts must support with equal force the proposition that the three acts repeatedly refer to the Rosebud Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist as such.

B. The Mellette County Act contains a phrase which renders Congress' intent regarding the future status of that portion of the Rosebud Reservation uncertain and therefore subject to the rule that doubtful expressions be resolved in favor of the Indians in statutes passed for their benefit.

As has been noted above at page 8 of this brief,

> statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.
> Alaska Pacific Fisheries v. United States, 248 U.S. at 89; 39 S.Ct. at 42 (1918)

The Mellette County Act is such a statute, passed for the benefit of the Rosebud Sioux. As Congressman Burke, the author of the Mellette County Act, stated during the debate over the bill on the floor of the House of Representatives, that

> this bill is in line--in fact, almost a duplication--of bills that have heretofore passed and become law, proposing to dispose of surplus and unallotted lands

> of the different Indian reservations of the country. . . . These lands were being sold by the government for the benefit of the Indians.
> Congressional Record, House of Representatives, 61st Congress, 2nd Session, Vol. 45, part 5, p. 5456, April 27, 1910.

This act contains a doubtful expression which, when considered in the light of the entire bill and of the legislative history discussed above, must be resolved in favor of the Indians. Section 1 of the Mellette County Act contains this clause:

> Provided, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation. (emphasis supplied)

Some may say that this isolated word is dispositive on the question of Congressional intent regarding this act. However, the Rosebud Sioux Tribe maintains that the dimunition referred to in the act is not a territorial dimunition of the reservation in the ordinary sense of the word, but rather a dimunition of the reservation only in the sense that the lands sold by the United States to settlers under the act would no longer be available to the Rosebud Sioux for future allotment or as a source of income, as they would have been but for this act. This is exactly the kind of use of language which Chief Justice John Marshall had in mind when he admonished all judges that:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.
> Worcester v. Georgia, 31 U.S. (6 Pet.) at 582 (1832)

This rule of construction should also be applied to the construction of statutes, when read in conjunction with Carpenter v. Shaw, supra, Red Bird v. United States, supra, and Alaska Pacific Fisheries v. United States, supra. These surplus and unallotted lands in Mellette County did not become part of the public domain because the Rosebud Sioux retained an equitable interest in those lands until and unless the entryman perfected his entry. See United States v. Brindle, 110 U.S. 688, 693; 4 S.Ct. 180, 182 (1884); Union Pacific Railroad Co. v. Harris, 215 U.S. 386, 389 (1910). The Supreme Court made this distinction clear in Ash Sheep Co. v. United States, 252 U.S. 159, 166; 40 S.Ct. 241, 243 (1920):

> when the Indians by the agreement released their possessory right to the government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should have been made, any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee . . .

If patents had been obtained by fraud to any of these lands, an action for damages and cancellation of the patents would lie on behalf of the United States for the use and benefit of the tribe against the fraudulent parties, with the damages awarded to the tribe. United States ex rel. Creek Nation v. Rea-Read Mill & Elevator Co., 171 F. 501 (C.C.E.D.Okla., 1909) Further, prior to the perfection of entries, the tribe would enjoy the right to all income that might flow from the surplus and unalloted lands in Mellette County. Memo. Acting Sol. I. D. May 25, 1937; Cohen, op. cit., p. 335. Therefore, it is clear that the Rosebud Reservation was "diminished" by the

Mellette County Act not only by reducing the acerage available to the tribe for future allotments, but also by making it possible for entrymen to stop the flow of income to the tribe from the opened lands.

The Field Solicitor of the Bureau of Indian Affairs agrees with this interpretation of the word "diminished" in the Mellette County Act. His interpretation is entitled to "great weight" and "is not to be overturned unless clearly wrong". United States v. Jackson, supra, and Stevens v. Commissioner, supra. His memorandum, which appears in full in the appendix, states that

> a casual reading of such Act [i.e., the Mellette County Act] might cause improper significance to be attached to the words "on the diminished reservation . . . [p. 4]

He then cites several phrases in the same act which refer to the reservation in ways which suggest that Congress did not intend to diminish or disestablish the Rosebud Reservation by the Mellette County Act. These phrases include:

a. "on said reservation" (§1)

b. "within the portion of the said Rosebud Reservation" (§2)

c. "within that portion of the reservation" (§4)

In addition to these and other examples of language indicating a Congressional intent contrary to that which might be inferred from the phrase "on the diminished reservation", several other internal inconsistencies of the Mellette County Act also mitigate against the inference that Congress intended to diminish the Rosebud Reservation. If Congress intended to disestablish the

Mellette County portion of the reservation, why did it specifically provide land for

> agency, school, and religious purposes, to remain reserved as long as needed and as agency, school, or religious institutions are maintained thereon for the benefit of said Indians [?] [§1]

Why did Congress direct the Secretary of the Interior

> to issue a patent in fee simple to the duly authorized missionary board, or other authority, of any religious organization heretofore engaged in missionary or school work on said reservation . . . [§1]

if this land would no longer be part of the reservation? Why did Congress reserve timber lands "for the use of the Rosebud Indians" (§4) if these lands would be located off the reservation? And why did Congress specifically prohibit the introduction of intoxicants into Mellette County for twenty-five years just as if that county were Indian county if it were not part of the reservation? [§10]

Section 9 of the Mellette County Act requires that the $35,000 appropriated for the appraisal and classification of the opened lands

> shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribe.

If Congress intended that Mellette County would no longer be part of the Rosebud Reservation, why did it impose on the Rosebud Sioux the cost of selling that which was no longer theirs? It would seem much more logical and in keeping with the fiduciary duty of the United States to conclude that the reason that Congress imposed this burden on the Rosebud Sioux

was that Congress recognized that the tribe still retained its beneficial interest in these lands while the United States acted only as trustee and real estate agent for them, charging them with the expenses of the sale directly, since there was no commission to which the agent could add his expenses. This analogy is entirely consistent with section 11 of the Mellette County Act wherein the United States stipulates that it acts only

> as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided.

A trustee is certainly entitled to deduct the necessary expenses in his administration of the trust from the amount that he pays over to the beneficiary. If, however, the corpus of the trust ever were the property of the trustee , that trustee would not be entitled to charge a party who was no longer the beneficiary with administration costs. Therefore, the fact that Congress charged the tribe with the expenses of the sale of the opened lands in Mellette County is yet another indication that Congress did not intend the Mellette County Act to diminish or disestablish any portion of the Rosebud Reservation.

Finally, Section 11 of the Mellette County Act provides that nothing in the act shall be construed to deprive the Indians of any treaty right unless "inconsistent with the provisions of this Act". Under the Treaty of 1868 and the Act of March 2, 1889 , the Cheyenne River Sioux were guaranteed a permanent reservation with a fixed boundary. This right cannot be abrogated by mere implication of a single equivocal

phrase in the Mellette County Act, under the aforementioned rule that intent to abrogate an Indian treaty right is not to be lightly imputed to Congress.[5]

The word to which the defendants may point as evidence of Congressional intent to diminish the reservation has been shown to be susceptible to, and was probably meant to have had, a meaning different than that which the defendants may advance. Under the rule that doubtful expressions are to be resolved in favor of the Indians, and in view of the many instances in the same act in which Congress expressed a clear intent not to disestablish or diminish the reservation, this lone doubtful island of language can hardly be dispositive of Congressional intent.

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[5] It should be noted that the absence of state jurisdiction in the area opened for non-Indian settlement is not inconsistent with either the expressed purpose of the three acts or with the historical circumstances which Congress had in mind when it passed them. Moreover, each and every act required to be done under the terms of the three acts could be done without necessarily diminishing the reservation. Also, the act contains no provision that would conflict with the proposition that the reservation was not diminished. This latter point is strengthened by the presumption in favor of the preservation of Indian rights in doubtful cases. Thus, the preservation of rights clause in Section 11 would offer its own basis for finding an undiminished Rosebud Reservation.

In the

UNITED STATES DISTRICT COURT

District of South Dakota, Western Division

CIV 72-4055

ROSEBUD SIOUX TRIBE,

Plaintiff,

v.

HONORABLE RICHARD KNEIP, Governor of the State of South Dakota; GORDON MIDLAND, Attorney General of the State of South Dakota; THE COUNTY OF MELLETTE; THE COUNTY OF LYMAN; THE COUNTY OF TRIPP; AND THE COUNTY OF GREGORY,

Defendants.

BRIEF FOR THE FOUR COUNTIES

William F. Day, Jr.
Attorney for the Counties
142 East Third Street
Winner, South Dakota

ON THE BRIEF:
William F. Day, Jr.
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INTRODUCTORY STATEMENT

> In order to understand Federal Indian law, a constant awareness of history must be maintained. The early pronouncements, such as those of Chief Justice Marshall, quoted in this treatise must be considered in the light of the historical situations then existing. There is a great expanse between the status of Indians as dependent nationalities in Marshall's time and their national citizenship today. Federal protection of tribal governments, which now exercise what are recognized simply as municipal powers, still survives, but not on the original basis.
>
> It has not been presumed that Congress has ever intended, or does intend, any fraudulent objective or any base act in its legislation in the unique field of Indian affairs. Courts presume that Congress acts in good faith and that presumption is adhered to in this revision. Further, it has been assumed that nothing could be more destructive of good will or more inimical to the advancement of which Indians are known to be capable than an immoderate accentuation of the idea that the United States Government is under a special obligation to all citizens who have Indian blood as a distinct class because of real or fancied injustices to their ancestors. In this connection it should be noted that there is a tendency to emphasize the obligations of the Government of the United States as trustee of the Indians and their rights. There is a related tendency in so doing to minimize the fact that it is also trustee of the rights of all the citizens and nationals of the United States. DEPT. OF INT., FEDERAL INDIAN LAW 2 (1958).

The Rosebud Reservation was opened by three acts: 1904, 1907 and 1910. Plaintiff seeks "declaratory judgment as to the effect of these acts on the size of the reservation." Answer for Plaintiff in reply to Counties' request to make more definite and certain, at 2 [hereinafter cited as A.P.]. The counties, not unaware of the recent decisions construing the effects of similar acts on other reservations, note that none of these decisions has been made in light of either an adequate legislative history of the particular act under consideration or the historical origin of the acts in general. As a result, the recent decisions have accepted a proposition similar to plaintiff's position that the acts "were not expressions of Congressional intent to diminish or alter the boundaries of the Rosebud Reservation." Brief for Plaintiff at x [hereinafter cited as B.P.]. It is the counties' position that neither the Seymour nor the recent opinions constitute any sort of a mandate for this court to rule in the tribe's favor if this court is convinced, and that conviction is soundly based upon probative evidence of congressional intent, that Congress, by the passage of the three Rosebud acts, intended to diminish the Rosebud Reservation.

As Justice Frankfurter once stated:

> Indian law is a vast hodge podge of treaties, judicial and administrative rulings, and unrecorded practices in which the intricacies, the perplexities, the confusions and injustices of the law governing Indians lay concealed.

Compounding this complexity is the fact that the court has been asked to ascertain precisely what effect a congressional delegation legislating in the first decade of the 20th century intended certain acts to have on the size of the Rosebud Reservation. In this respect the usual "vantage point of time" is in actuality a serious disadvantage, and with this in mind, the counties have attempted to reconstruct the situation as it existed in the early 1900's with the aid of:

1. The text of the three acts;
2. The Senate and House Documents;
3. The Congressional Record;
4. The transcripts of the negotiation sessions;
5. Correspondence and reports from the Department of Interior and the Commissioner of Indian Affairs; and,
6. Later statutes, state historical documents and reports of the Rosebud Indian Agents.[1]

The counties realize the limited probative value of some of these materials, but have nevertheless included them in order to recapture the tenor of the period. This tenor represents, in effect, the counties' theory in this action. In this respect, we would urge the court not to place too much emphasis or significance on any one word or sentence in any of this material. Congressional intent can be a very illusive concept. For example, the following quotation appears in plaintiff's brief at page 15

> [T]his bill is in line--in fact, almost a duplication--of bills that have heretofore passed and become law, proposing to dispose of surplus and unallotted lands of the different Indian reservations of the country . . . [T]here are two propositions to be considered in disposing of the unallotted and unused lands on Indian reservations. One is, at the earliest possible date, to get among the Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms . . . [This] will have the effect of civilizing the Indians who have allotments and also give value to these allotments which at present are of very little value . . .In addition to that, just as soon as these reservations are opened up and settled[,] railroads usually come in and thereby give greater value to the lands owned by the Indians. B.P. at 15.

Apart from the fact that this is one of only three isolated references to the Congressional Record or Senate and House Documents in plaintiff's entire brief, the quotation is illustrative of two other factors of which the court should be aware.

In the first place, to cite this statement for the proposition that "Contemporary history indicates that Congress did not intend the three acts to operate to diminish the Rosebud Reservation" (B.P. at 14) is highly questionable--at least in the <u>form</u> presented in plaintiff's brief. Congressman Burke actually stated:

> Mr. Burke of South Dakota . . . . I might say, Mr. Speaker, that there are two propositions to be considered in disposing of the unallotted and unused lands on Indian Reservations. One is, at the earliest possible date, to get among the Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms, <u>AND I BELIEVE THAT THE PLACING THROUGH WHAT WERE HERETOFORE RESERVATIONS</u> actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to these allotments which at present are of very little value. 45 Cong. Rec. 5457 (1910) (emphasis added).

The court will note how, by the use of three small dots and the deliberate omission of several very important words, the tenor of an entire paragraph can be destroyed.

Secondly, and more importantly, the correct quotation is illustrative of an even greater problem.

---

1. The counties have relied primarily on the contemporary documents of the period; the bulk of the material presented in this brief is from pre-1910 sources, with some material dating up to 1920. It is the counties' position that <u>this</u> is <u>the</u> period from which the intent of Congress should be gleaned. The direction or purpose of "Indian Policy" fluctuated in later decades and for this reason the counties have been somewhat reluctant to accept any later reference at face value unless that reference could be substantiated in the documents of the period to which it referred. In this respect, the counties have followed the mandate of Tacitus . . . "Refer everything back to its own year."

Many of the materials with which the court will be presented contain references to "on," "in," and "within," such as the "on" in the above quotation. Initially, one might equate the "disposing of the unallotted and unused lands <u>on</u> Indian Reservations" with the continued existence of the reservation. Yet, shortly thereafter, is an unequivocal reference to the placing of settlers "through what were <u>heretofore</u> reservations." By itself, the paragraph might seem ambiguous and confusing; but when viewed as an integral part of other material of the period, the tenor of the entire paragraph clearly emerges and this is the counties' point. Unless these materials are placed in their proper context <u>and viewed in their entirety</u>, the crux of nearly a decade of Indian legislation intended by Congress to extinguish certain portions of the Rosebud Reservation will be for naught, much to the detriment of the non-Indian settlers and their descendants, who will nearly sixty years later suddenly find themselves within the exterior boundaries of a reservation and subject to a tribal jurisdiction, the limits of which plaintiff does not even care to expound upon at this time.

The counties agree with plaintiff that the exact powers of the Rosebud Sioux Tribe are not in litigation at this time and for this reason a discussion of these powers has not been presented in this brief. However, it is interesting to note that even the cursory list appearing in plaintiff's answer to the counties' motion for a more definite statement does not appear anywhere within plaintiff's brief. Since plaintiff is asking this court to declare, in effect, that the counties are within the Rosebud Reservation and therefore subject to these tribal powers, the counties think some mention should be made of the scope of this tribal jurisdiction. Plaintiff's list will suffice for this purpose:

(a) Criminal Jurisdiction, <u>Smith</u> v. <u>Temple</u>, 152 NW2d 547, 548
(b) Civil Jurisdiction, <u>Smith</u> v. <u>Temple</u>, supra
(c) Sales tax authority, attached memorandum of the South Dakota Department of Revenue and within this area the Rosebud Sioux tribe and the United States would have jurisdiction to the exclusion of the defendants
(d) Tribal taxing authority, <u>Iron Crow</u> v. <u>Oglala Sioux Tribe</u>, 231 F2d 89
(e) Tribal regulation of intoxicants, 28 USCA Section 1161

A.P. at 2.

It is the counties' position that Congress, by the passage of the three acts, intended to separate and remove the counties from the Rosebud Indian Reservation in such a manner that they would never again be considered to be either within the exterior boundaries of the reservation or subject to whatever powers the Rosebud Sioux Tribe might lawfully exercise therein. The purpose of this brief is to present to the court probative evidence of that intent.

1904 ACT[2]

I. THE GENESIS OF THE 1904 ACT

A. THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

The Rosebud Reservation was created by the Act of 1889. Although it was stated in the preamble that this was to be a "permanent" reservation, Section 12 therein provided:

> Sec. 12. That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner, if in the opinion of the President it shall be for the best interest of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which said reservation is held of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress: Provided, however, That all lands adapted to agriculture, with or without irrigation, so sold or released to the United States by an Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers, and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education . . . . Act of March 2, 1889, Section 12, 25 Stat. 888 (emphasis added.)

In early 1901 Inspector James McLaughlin, acting pursuant to Section 12 and at the request of the Department of the Interior, concluded an agreement with the Indians for an outright lump-sum cession of the surplus portion of the Rosebud Reservation lying within Gregory County. As plaintiff states in its brief, this agreement was of "a time when a completely different policy prevailed in Indian land acquisitions." B.P. at 29.

Since the entire tenor of this part of plaintiff's brief indicates a concession of the effect this agreement would have had on the size or boundary of the Rosebud Reservation had it been immediately ratified by Congress (B.P. at 29 - 30)[3], the counties will only summarily refer to the transcript of the 1901 negotiations wherein Inspector McLaughlin stated:

> By disposing of this corner of the reservation it would leave you a nice square reservation . . . .
>
> It will leave you about the same sized reservation as the Pine Ridge Indians have . . . .
>
> The cession of Gregory County will leave your reservation a compact almost square tract, and would leave your reservation about the size and area of Pine Ridge reservation . . . .
>
> Every person would have the previlege [sic] of remaining on the land that has been allotted to him, or of relinquishing it and removing to the diminished reservation, but I would advise you who have selected tracts of land to remain upon your allotments in case of the cession of this land to the Government . . . .
>
> Negotiating for this corner of the reservation . . . .
>
> In negotiating with Indians for tracts of land, a portion of which has been allotted to them, the privilege has been given the Indians to elect whether they shall remain upon their allotments or relinquish their allotments and remove to the reservation. I do not think that it is

[2] Act of April 23, 1904, 33 Stat. 254–A portion of Gregory County. A detailed history of the openings of the Rosebud Reservation appears in 18 S.D. L. Rev. 85 (1973). The counties will use the same chronological approach appearing therein, although in a summary fashion, in this brief.

[3] If plaintiff wishes to change its position as to the necessary effect the original 1901 lump-sum cession agreement would have had on the size or boundary of the Rosebud Reservation, the counties respectfully request leave to submit additional material on this point to the court.

> for the best interest of the Indians at any time to vacate their allotments. The lands that you have taken are, of course, the best lands of this county, and it is very doubtful if you could find as good land anywhere within the diminished reservation for the reason that the best lands have all been allotted . . . . Department of the Interior, Office of Indian Affairs, Transcripts of Councils with the Indians of the Rosebud Reservation by Inspector James McLaughlin, April and September, (1901) (emphasis added) [hereinafter these transcripts are cited as C.T.].

As for the agreement itself, only two provisions merit any discussion at this point and their significance will not become fully apparent until later in the brief.

The School Land Provision. South Dakota's enabling act provided that:

> Nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain. Act of February 22, 1889, ch. 180, 25 Stat. 676 (emphasis added).

If the original 1901 lump-sum cession agreement had been ratified, the reservation would have been "extinguished" and the land restored to the "public domain." The Indians would have been left with what Inspector McLaughlin referred to as a "nice square reservation." So on the first day it was presented on the floor of the Senate for ratification, Senator Gamble immediately proposed, and the Senate immediately agreed to, without discussion, the following amendment:

> The next amendment was, at the end of the bill, to insert the following as a new section:
>
> SEC. 4. That sections 16 and 36 of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools, and the same are hereby granted to the State of South Dakota for such purpose; and in case either of said sections, or parts thereof, of the lands in said county of Gregory is lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract herein ceded, to locate other lands not occupied, in quantity equal to the loss, and such selection shall be made prior to the opening of such lands to settlement.
>
> The amendment was agreed to. 35 Cong. Rec. 3187 (1902).

This same provision also appears verbatim in the three final acts of 1904, 1907, and 1910. Plaintiff has merely noted that the school lands were exempted from sale and/or disposition and has not offered the court one word of explanation why Congress thought it necessary to incorporate this provision into the three acts, which plaintiff would like the court to declare " did not diminish the Rosebud Reservation" (B.P. at ix), from an agreement which plaintiff concedes could have only diminished the reservation. Perhaps plaintiff wishes the court to think of this as just another instance in which "Congress can be excused from employing language suggested by another and echoing an abandoned policy" (B.P. at 30), but in this instance the court would not only have to excuse the language but also the underlying reasons given in the Congressional Record and Senate and House reports as well. The counties will cite and discuss these references later in their proper sequence.

2. The "Preservation of Rights" [Benefits] Provision. Article V of the original 1901 lump-sum cession agreement provided:

> It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement. S.Doc. 31, 57th Cong., 1st Sess. 42 (1901).

But for the sophisticated argument which plaintiff has founded upon the presence of this "crucial" (B.P. at 41) provision in the three final acts, the counties would hardly have thought it worthy of any comment whatsoever and would have therefore treated it in the same manner as Congress did.

Undoubtedly, the provision was intended to guarantee the preservation of Indian benefits, but to argue from this premise to the premise that "one of the prime benefits to which a tribe is entitled is surely that of a secure reservation with a fixed boundary" (B.P. at 42), and finally conclude that the original 1901 lump-sum cession agreement would not have diminished the Rosebud Reservation, would be almost patently absurd--in light of the material that is now available concerning the negotiation and congressional treatment of the agreement. It will be the counties' position throughout the remainder of this brief that plaintiff's sophisticated argument based upon this "crucial" provision in the three acts is equally untenable--when viewed from a proper historical perspective and in light of the material hereinafter presented.

B. THE TRANSITION PERIOD: 1902 - 1904

It is during this time period, at least as far as the Rosebud Reservation is concerned, that Congress changed the type of arrangement it would use in acquiring Indian lands. The agreement of 1901 was amended, and as such, finally emerged as the Act of 1904. The counties agree with plaintiff that as to the Rosebud Reservation, "the Gregory County Act would establish a new policy." B.P. at 30 (emphasis as is original). We also commend plaintiff for its quotation from such an excellent source of legislative history as the House of Representatives Report No. 443 appearing at 29 of plaintiff's brief:

> Both of these bills [i.e., both the House and Senate versions] present a new idea in acquiring Indian lands, and if this bill should be enacted into law it will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians and pay them therefor and then open the same to entry and settlement . . .
>
> This bill provides that the lands shall be disposed of under the homestead laws by the settler paying therefor and the proceeds paid to the Indians, and it is expressly provided by Section 6 of this bill that the United States shall in no manner be bound to purchase any portion of the land except the school sections, or dispose of the same except as provided, or to guarantee to find purchasers for said lands, it expressly stating that the intention of the act is that the United States shall act as trustee for the Indians in disposing of the lands and pay over the proceeds from the sale thereof only as the same are received. B.P. at 29 - 30.

But we do not agree that this singular quotation can realistically be cited to support the proposition that it alone is either sufficient "legislative history" to "dispel" any confusion or cause such "ambivalence" to render the "language of the act subject to the rule . . . that doubtful expression in treaties and statutes dealing with Indian affairs must be resolved in favor of the Indians." B.P. at 31. This is especially so in view of the paragraph appearing on the very next page in the same report:

> There is no question but what the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, which will be left compact and in a square tract and a reservation about equal in size to the Pine Ridge Reservation in South Dakota. H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904) (emphasis added).

Rather, the position of the counties will be that this act in fact diminish the Rosebud Reservation

in precisely the same manner which would have occurred had the original 1901 lump-sum cession agreement been ratified. The following interrelated propositions will be utilized to support the counties' position.

II. THERE IS NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE "NEW POLICY" WAS INTENDED TO AFFECT THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

III. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE ONLY REASON FOR THE "NEW POLICY" WAS AN APPROPRIATION CONFLICT WHICH WAS NOT IN ANY WAY CONCERNED WITH THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

IV. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE AMENDED 1901 CESSION AGREEMENT (1904 ACT) WAS INTENDED TO EFFECT THE SAME DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

V. THE DOCUMENTS AND STATUTES CONCERNED WITH GREGORY COUNTY AFTER THE PASSAGE OF THE 1904 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED

II. THERE IS NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE "NEW POLICY" WAS INTENDED TO AFFECT THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

If the 1904 Act was not intended to diminish the Rosebud Reservation as the original 1901 lump-sum cession agreement would have, where in any of the contemporary documents is there any reference to this fundamental policy change? Plaintiff's brief certainly does not contain any citations to support what would have to be referred to, at least as to the Rosebud Reservation, a rather drastic reversal in policy within a period of two years.

Here, in the documents of this period, not in the 1930's, 1940's or the 1970's, is where the metal of plaintiff's concept should be put to the test. Certainly, in the approximately 200 pages of material specifically dealing with this particular reservation and the 1904 Act, there should have been one paragraph which would at least arguably support plaintiff's position.

But it is not the counties' position that the absence of any evidence to support plaintiff's position should, of itself, be determinitive of the issue of what effect the 1904 Act had on the size of the Rosebud Reservation--for there is ample evidence which should suffice to that end.

III. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE ONLY REASON FOR THE "NEW POLICY" WAS AN APPROPRIATION CONFLICT WHICH WAS NOT IN ANY WAY CONCERNED WITH THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

A. THE CONGRESSIONAL RECORD

Approximately 50 pages of the Congressional Record now record the heated debate that took place on the floor of the Senate in March and April of 1902. The sole subject of this debate was the ratification of the original 1901 lump-sum cession agreement and the appropriation "policy" for which

it stood:

> Mr. GAMBLE . . . . It has long been the policy of the Government to open the Western reservations to free homes. The homestead law enacted so many years ago certainly proved of inestimable value, not only to the West, but to the country at large. A different policy was inaugurated some ten or twelve years ago, under which, when reservations were opened, the settler was obliged to pay the same price for the land that the Government paid the Indians for the relinquishment of their title.
>
> Two years since a free-homes bill was passed by Congress after having been discussed at great length, especially in this body. It occurs to us that by that act the homestead policy has been reestablished [sic] by the Government . . . .
>
> Mr. STEWARD . . . . If the Government pays $1.25 an acre for the land, and that is all the Indians ought to demand, then I should be in favor of opening it to free homesteads, but I am not in favor of paying the Indians a price which is fixed by the value of adjoining land held by white men, and then opening it to free homes, because before we get through with it we shall find that it will involve a vast amount of money.
>
> I make these observations so that the situation may be understood by the Senate. If Congress adopts the policy of fixing the price of land to be opened and not leave it to the Indians, then we can open it to free homesteads for such price as will be reasonable; but if we leave it to the Indians to fix the price, under the advice of white men around there, then it will become so extravagant that the scheme can not be carried out.
>
> Mr. PLATT. . . . It is true that several years ago--more than ten years ago, I think--in opening Indian reservations, we paid large and extravagant prices for land to the Indians, upon the theory that the Government was going to be reimbursed for its expenditures by the settlers paying for the land which they settled upon a sufficient sum to reimburse the Government. That went on for years, and everybody supposed that that was acceptable to the settlers. Then the settlers began to agitate that the Government should remit to them the obligation which they had incurred to pay for the land, and thereby reimbruse the Government; and the history of that agitation of course is well known. The Government remitted about $35,000,000 which it had paid to the Indians and which the settlers had agreed to repay to the Government by the passage of that free-homes bill. 35 Cong. Rec. 3187, 3188 (1902).

The bill continued to be sporadically debated and was passed over into April:

> Mr. PLATT of Connecticut. . . . The question is whether the Government, in opening the lands to settlement, shall give the lands thus purchased from the Indians to the settlers under the homestead law, or whether it shall require the settlers who take up these lands under the homestead law to pay for them a sum per acre equivalent to what the Government pays the Indians for them. In other words, in opening the Indian reservations which already remain, what is to be the policy of the government? Are we to pay the Indians a high price for the lands which we obtain a cession of, and then give those lands to the settler free of cost, or shall we require the settlers to pay as much for the lands as will make up wholly for the amount which we have paid for them? That is the question, and Senators will see that it is a far-reaching question.
>
> I do not know how many million acres still remain in Indian reservations which must in the future be opened to public settlement, but there are many millions, and, at the rate we have been paying the Indians under the agreements made with them for such lands, the amount to be expended in the not very distant future will run up into the millions . . . .
>
> Now, this particular agreement comes here to be ratified upon a payment to the Indians of about $2.50 an acre for the surplus lands within their reservation which are under the agreement to be ceded to the United States and become part of the public domain. The Indians in negotiating said that was not a fair price for the lands and they were worth a great deal more, but finally the negotiation was concluded. The agreement comes here. So far as the Senate considers it, it is an agreement to open a reservation--to pass ordinarily without any particular examination or any thought of the consequences to the Government in the matter of expense. I will not go into the history of the negotiations as to these lands, but the price paid or agreed to be paid to the Indians is $2.50 an acre for the entire acreage which is to be brought under the public domain by cession to the United States.

> The bill proposes that the land thus acquired shall be open to homestead settlement without requiring any payment for the land settled upon from the settler. My amendment proposes that the settler shall pay $2.50 an acre, being the same which the Government has agreed to pay to the Indians, and that thus the Government shall be reimbursed for the amount expended for the purchase . . . . Cong. Rec., supra, at 4801, 4802.
>
> Mr. CLAPP. . . . Here is this reservation in South Dakota. Of course the Senators from South Dakota can speak more specifically of the character of the reservation and its surroundings than I can; but because we have to pay the Indians a certain amount for that reservation, as a matter of progressive Indian policy, for the purpose of separating the Indians and extinguishing the reservation or for the purpose of meeting the advancing demands of civilization for the use of the lands, it does not follow that land is primarily and inherently worth so much an acre. Cong. Rec., supra at 4807.
>
> Mr. DUBOIS. . . . I am opposed also to giving the Indians money directly. That is a new policy, a policy of recent years. It does more to demoralize the Indians than anything else. It does them no good. The proceeds of this land, when it is appraised and sold, should be put aside for the benefit of the Indians.
>
> Mr. TILLMAN. Mr. President--
>
> Mr. DUBOIS. Excuse me for just a moment. Then the land should be thrown open to homestead settlers. In some instances, of course, you will find reservations near towns and cities or for some other reason where the lands will be very valuable. In that case the agents of the Government could fix the lowest price at which the lands should be sold, and in an extraordinary case of that sort you could reimburse the Government and give the balance of it to the Indians.
>
> Now, generally that would be my policy, and I think we have about come to the time when we should cease to go through the farce of treating with the Indians. Every Western man and some Eastern men who are familiar with it, like the Senator from Connecticut [Mr. PLATT], know this to be true. I stated it yesterday, and I will state it again. When a commission is sent out to treat with Indians for a cession of their land there is a pressure from all sides to get any sort of an agreement, no matter what it is. The Indians are pretty cunning. They understand that and put the price up way beyond what the land is worth or ever will be worth, and they insist now in addition in these later days that the money shall be paid to them directly. I think it ought to be stopped. Cong. Rec., supra at 4860 - 4861.

Although Senator Gamble prevailed in the Senate, the bill was never actually debated in the House. The provision that was ultimately decided upon was the trustee-homestead provision, the origin of which can be detected in the last comment of Senator Dubois.[4]

In any event, that this appropriation conflict was the sole reason for the "new policy" is readily supported by the language appearing in the Congressional Record after the amendment had been made.

> Mr. GAMBLE. At the last session of Congress this bill was passed with the free-homes provision, which was insisted upon here. It has met with serious objection in the other House, and can not be carried through there. The bill has been amended to meet those objections; and we prefer to have the bill passed in its present form. Should the bill go to the other House containing the free-homes amendment, it would meet the fate of the bill passed last year. We are very anxious to have this bill in its present form. The delegation of the State of South Dakota is satisfied with it under existing conditions, and I trust no objection will be interposed by the Senator from Idaho. 36 Cong. Rec. 2748 (1903).
>
> Mr. BURKE. Mr. Speaker, this bill provides for the opening to settlement of 416,000 acres of land, now a portion of the Rosebud Reservation, in South Dakota, being that

[4] Although the courts have not been able to determine the precise origin of the trustee-homestead provision as such, it appears to have been formulated by one of the Committees on Indian Affairs after May 1, 1902, and before February 1, 1903.

portion of the reservation in Gregory County. In 1901 a treaty was entered into with the Rosebud Indians on the part of the United States, by which the Indians agreed to sell to the Government this land for $2.50 per acre. That treaty was transmitted to Congress, and because of the fact that it provided that the Government should pay for the lands outright and then take the chance of the Treasury being reimbursed by disposing of the lands to settlers, it never got further than through the Committee on Indian Affairs, which unanimously reported it favorably. It was never given consideration in the House.

Toward the concluding days of the last session of Congress a new bill was prepared, substantially as this bill now provides, and that bill provided that the lands should be ceded by the Indians to the Government, disposed of to settlers under the provisions of the homestead law, the price to be fixed at $2.50 an acre, as was provided in the original treaty. That bill did not receive consideration in the last Congress because of lack of time, but during the summer that bill was submitted to this tribe of Indians for their acceptance, and forty-eight more than a majority consented to accept the terms of that bill. This bill is substantially the same as the bill which I have just referred to, except that the committee, in view of a suggestion made by the Commissioner of Indian Affairs, in which he said he had no objection to the passage of this bill provided the Indians were insured of as much money as they would have received under the treaty, instead of fixing the price at $2.75, which was provided in the bill submitted to the Indians during the summer, fixed the price at $3 per acre for all lands taken within the first six months and $2.50 for all lands taken thereafter.

It was thought by the committee that this would certainly insure to the Indians as much money as they would have received under the original treaty, and, in my judgment, it insures their receiving considerably more. There is no opposition to the passage of this measure, so far as I know. The Indian Bureau and the Secretary of the Interior have both approved it, providing we fix a price, as we have done, that will insure the Indians as much money as they would have received under the original treaty. The Committee on Indian Affairs has considered it fully and at length and has spent several meetings of the full committee considering it. The report of the committee is unanimous. I do not care to occupy the attention of the House in making any extended remarks on the bill, and unless some gentleman desires to ask some questions I will reserve the balance of my time. 38 Cong. Rec. 1423 (1904).

B. THE SENATE AND HOUSE DOCUMENTS

Precisely the same explanation for the trustee-homestead amendment is also stated in all six of the Senate and House Reports. Before the trustee-homestead amendment:

> The committee have amended the bill, striking out the provision relative to "free homesteads," thereby proposing to open the land to settlement under the homestead and town-site laws, and requiring the settlers to pay for the land at $2.50 per acre, thus reimbursing the Government for the amount paid to the Indians. H.R. Rep. No. 954, 57th Cong., 1st Sess. 1-2 (1902).
>
> The Committee on Indian Affairs, to whom was referred the bill (S. 2992) ratifying an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation to carry the same into effect, having had the same under consideration, recommend that the bill be amended by striking out all after the enacting clause and inserting the bill H.R. 9057 as reported to the House (Report No. 954). The effect of this amendment is simply to substitute the House bill for the Senate bill, the only material difference in the bills being that the Senate bill contains a provision for "free homesteads," . . . . H.R. Rep. No. 2099, 57th Cong., 1st Sess.1 (1902).

After the trustee-homestead amendment:

> The agreement made with the Indians provided that the United States should pay for the land at the rate of $2.50 per acre, $250,000 of the amount to be expended in the purchase of stock cattle for the benefit of the Indians and the balance to be paid per capita in cash in five annual installments.
>
> A bill for the ratification of this treaty and opening the lands to settlement and entry was reported by this committee favorably. A similar bill passed the Senate, was referred

> to this committee, and was also unanimously reported, and both bills have been upon the Calendar of the House for passage for some time. The present bill proposes to adopt a new policy in acquiring lands from the Indians, and it provides that the lands shall be disposed of to settlers under the homestead and town-site laws, and to be paid for by the settlers, and the money to be paid to the Indians only as it is received in payment for the land from the settler. H.R. Rep. No. 3839, 57th Cong., 2d Sess. 1-2 (1903).
>
> [The Senate Committee on Indian Affairs adopted House Report No. 3839] S. Rep. No. 3271, 57th Cong., 2d Sess. (1903).
>
> The agreement, as made with the Indians, provided that the United States should pay for the land at the rate of $2.50 per acre, and from the proceeds $250,000 was to be expended in the purchase of stock cattle for the benefit of the Indians, and the balance was to be paid per capita in cash, in five annual installments. A bill for the ratification of this treaty and opening the land to settlement was transmitted by the Secretary of the Interior to Congress in the first session of the Fifty-seventh Congress. This bill provided simply for a ratification of the treaty and that the lands were to be disposed of under the provisions of the homestead law at $2.50 per acre.
>
> The bill was reported by this committee and was also favorably reported by the Committee on Indian Affairs in the Senate and passed the Senate. It appearing that the House was opposed to the passage of the same a new bill was presented late in the second session of the Fifty-seventh Congress, substantially the same as the present bill now under consideration, which was favorably reported by this committee, but too late in the session to have consideration in the House.
>
> Both of these bills present a new idea in acquiring Indian lands, and if this bill should be enacted into law it will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians and pay them therefor and then open the same to entry and settlement, and if not immediately, ultimately, under the provisions of what is known as the free-homestead act. H.R. Rep. No. 443, 58th Cong., 2d Sess. 1-2 (1904).
>
> [The Senate Committee on Indian Affairs adopted House Report No. 443.] S. Rep. No. 651, 58th Cong., 2d Sess. (1904).

C. THE TRANSCRIPTS OF THE 1903 NEGOTIATIONS

Finally, the same explanation also appears throughout the transcript of the 1903 negotiations, which were conducted after the amendment was in its final form:

> . . . There has been a sentiment growing in Congress for a number of years past, and is now stronger than ever, against paying Indians for ceded lands direct from the U.S. Treasury. That is what is referred to in my letter of instructions, which I read to you, as being a new departure in the manner of disposing of the surplus lands of Indian reservations, and instead of paying Indians direct from the U.S. Treasury as heretofore for their surplus lands; they will be paid from the proceeds of the sale of lands ceded; the Department thus acting as trustee for the Indians, and the Interior Department having charge of the lands will dispose of them in such manner as will secure to the Indians the highest price obtainable. This is the new departure referred to, and I believe, my friends, that no treaty will ever again be made with Indians, by which they will receive a lump sum consideration for the tract ceded . . . . I am here to try to enter into a new agreement, from which you will receive as much for your lands as the agreement of two years ago provided, but the manner of disposing of it is different . . . . The Government collects from the homesteader and pays it over to you . . . . You will still have as large a reservation as Pine Ridge after this is cut off . . . . C.T. at 5, 12, 22 (1903).
>
> The objections to the former agreement was not on account of the price, but to the manner of payment . . . . C.T. at 50 (1903).
>
> . . . The agreement which I submit for your consideration is similar in every respect to that of two years ago, except you will have to wait for the sale of the land to receive your money . . . . C.T. at 37 (1903).

The Indians themselves understood that the amended agreement simply meant, as Ghost Bear stated, that "the Great Father" was not going to "pay for the land himself." C.T. at 41 (1903). For the Congress, Inspector McLaughlin and the Indians, this was the only "new policy"—an amendment which represented a feasible solution to the opposition's appropriation argument and which was not in any way concerned with the diminution of the Rosebud Reservation which would have followed the ratification of the original 1901 lump-sum cession agreement.

IV. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE AMENDED 1901 CESSION AGREEMENT (1904 ACT) WAS INTENDED TO EFFECT THE SAME DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

A. CONTINUITY

1. Brief for Plaintiff. At 29 of plaintiff's brief the following statement appears: "The Gregory County Act incorporates this language verbatim, as it does the entire text of the 1901 agreement." B.P. at 29. Although the counties prefer to refer to the Gregory County Act as the amended 1901 lump-sum cession agreement, for that is what the 1904 Gregory County Act is, we agree with plaintiff that the text of the agreement is there. But we do not agree that the presence of the entire text of the original 1901 lump-sum cession agreement (except for the 1901 appropriation provisions) can be rationalized away, as plaintiff has attempted, by merely stating that "certainly Congress can be excused from employing language suggested by another and echoing an abandoned policy in its very first attempt to implement a new policy." B.P. at 30.

Nor do we agree with plaintiff that "Congress exhibited an understandable ambivalence an [sic] confusion in the Gregory County Act over exactly what language would be most appropriate to express the workings of the new land aquisition policy"; that plaintiff's isolated quotation of Senator Burke's report is sufficient "legislative history" to dispel any "confusion" or "ambivalence",[5] or that such ambivalence "renders the above language of the act" [the entire 1901 agreement, as incorporated??] subject to any rule of construction of resolving anything in favor of the Indians. B.P. at 31. Rather, it is the counties' position that Congress only amended the 1901 agreement to the extent necessary to implement the new policy and did not intend to change the other aspects of the agreement in any way.

For example, the format of the bill itself, as introduced by Congressman Burke to the House on January 30, 1904, was:

> The Clerk read the bill, as follows: A bill to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provision to carry the same into effect.
>
> [entire text of 1901 Agreement]

[5] The merits of plaintiff's selected legislative history were noted in the introduction of this brief and at 13, supra.

> Therefore,
> Be it enacted, etc., that the said agreement be and the same hereby is, accepted, ratified and confirmed as herein amended and modified.
>
> [1901 Agreement as amended and modified]

38 Cong. Rec. 1422-1423 (1904).

It is the counties' position that the mere fact that Congress did use not only the language of an "abandoned" policy, but the entire text of an "abandoned" agreement, would in and of itself, seem to be indicative of a continuity of policy as amended, and not as plaintiff would have the court believe, congressional incompetency.[6]

On this same point the Court will also have to excuse President Roosevelt, for as plaintiff states at 25:

> He employed language in that proclamation which nearly duplicated the language which Congress used in the Act of April 23, 1904. From this language, one might infer that Roosevelt did contemplate a diminished Rosebud Reservation. B.P. at 25.

2. The Senate and House Documents. Even the Senate and House Reports on the 1903 and 1904 acts, which are discussed in detail in other parts of this brief, not only treat the original and amended 1901 agreement in this same fashion, but also amend and make a part of each report, several of the 1901 documents in their entirety.

3. The Congressional Record. If one were to choose almost any page in the Congressional Record before the amendment of the original 1901 lump-sum cession agreement and compare the terminology appearing therein to that used after the agreement had been amended, he would note that the Congressmen continued in all instances to refer to the subject matter with which they were concerned in exactly the same descriptive terminology. In this connection, it is also interesting to note that both plaintiff and some of the recent opinions seem to attach some sort of mystical significance to the "opening" or "opened reservation" terminology and in some manner equate this terminology with the new trustee-homestead provision which supposedly "opened" the reservation without diminishing the size or boundary of that reservation. Yet, at least with respect to the Rosebud Reservation, this simply is not the case. This "opened" reservation terminology was used not only by nearly every member of Congress participating in the debates from the first day the original 1901 lump-sum cession agreement was introduced:

> Senator GAMBLE. . . . It has long been the policy of the Government to open the western reservations . . . . Within the limits of the lands proposed to be opened to settlement there are upward of 450 Indian allottees, and the settlers who take these lands

[6] Plaintiff's position becomes even more of an anomaly when one considers the expertise of South Dakota's congressional delegation. The dominant members were Senator Robert J. Gamble and Congressman Charles H. Burke. Senator Robert J. Gamble was elected to the United States Senate in 1900. He remained in that office until 1912, and was very active in all legislation concerning Indian lands during that period. Charles H. Burke was elected to the House of Representatives in 1900. He remained in that office until 1914 and later served for several years as Commissioner of Indian Affairs.

These two gentlemen had many things in common:

(1) Both served on the Indian Affairs Committees in their respective houses.
(2) Both authored considerable legislation affecting Indians and Indian lands, including all three Rosebud Acts.
(3) Both submitted the committee reports concerning the legislation discussed herein to their respective houses.
(4) Both were members of the congressional delegation before the Rosebud Reservation was diminished.
(5) The materials herein indicate that both understood the so-called "Crook Treaty," and were aware of its relation to the later acts.
(6) One or the other of these men introduced the bills discussed herein.

> will be obliged to assume the responsibilities of the local community practically unaided by the Indians, and to bear largely all the responsibilities that have heretofore been borne by the General Government . . . .
>
> Mr. STEWARD. . . . In this very case the committee had much doubt whether the land was worth $2.50 an acre; but they finally consented to report the bill, because the Senator from South Dakota insisted that it would be detrimental and ruinous to the State of South Dakota to have settlement there tied up in this way, and that these lands ought to be opened . . . .
>
> Mr. PLATT. . . . It is true that several years ago—more than 10 years ago I think—in opening Indian reservations, we paid large and extravagant prices for the land to the Indians. . . . 35 Cong. Rec. 3187, 3188 (1902) (emphasis added).

but also appears throughout the congressional documents and debates before the turn of the century in connection with other pure lump-sum cession agreements.

4. The Office of Indian Affairs. As further indication that the trustee-homestead amendment was not intended to affect the diminution aspect of the original 1901 lump-sum cession agreement, reference is made to the manner in which the Office of Indian Affairs handled the amendment. Inspector McLaughlin's new instructions simply explained it and then stated:

> It is not deemed necessary herein to give you any definite instructions as to the form of the agreement and the manner of its execution inasmuch as you are thoroughly familiar with these features of the subject. Attention is invited in this connection, however, to Departmental instructions to you dated March 21, 1901, in connection with the negotiation of the former agreement. Letter from W.A. Jones, Commissioner of Indian Affairs to Inspector James McLaughlin, June 30, 1903 (emphasis added).

Inspector McLaughlin explained the trustee-homestead amendment to the Indians in the same manner: "I am here to enter into an agreement which is similar to that of two years ago, except as to the manner of payment . . . ." C.T. at 21 (1903).

B. THE SCHOOL LAND PROVISION

In addition to the above references to a continuity in policy, there is one particular provision that the counties think deserving of more analysis than it has received in plaintiff's brief, or for that matter, in any of the briefs submitted in the recent cases: the school land provision.

Thus far, the only treatment this school land provision has received in any of the briefs is a mere acknowledgement of its presence. For example, plaintiff merely lists the provision in the "Lands exempted from sale and/or disposition" and "appropriations" sections of its brief. B. P. at 31-33, 41. But for the reasons stated in the Congressional Record and the Senate and House documents for its necessary inclusion in the original and amended 1901 agreement, no other treatment would probably have been warranted. When the provision is examined in light of these reasons, however, it is the counties' position that it assumes such an added degree of significance as to constitute one of the most enlightening provisions to be found in any of the acts.

On the first day the original 1901 lump-sum cession agreement was presented on the floor of the Senate for ratification, Senator Gamble immediately proposed, and the Senate immediately agreed to, without discussion, the following amendment:

> The next amendment was, at the end of the bill, to insert the following as a new section:
> SEC. 4. That sections 16 and 36 of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools, and the same are hereby granted to the State of South Dakota for such purpose; and in case either of said sections, or parts thereof, of the lands in said county of Gregory is lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract herein ceded, to locate other lands not occupied, in quantity equal to the loss, and such selection shall be made prior to the opening of such lands to settlement.

The amendment was agreed to. 35 Cong. Rec. 3187 (1902).

Senator Gamble then explained the reason for its inclusion to the Senate:

> Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the lands restored to and became a part of the public domain. This would withdraw about 29,000 acreas of these lands and would leave 387,000 acres to be opened to settlement, and which would be affected by the proposed amendment. Cong. Rec., supra (emphasis added).

The provision of the enabling act to which Senator Gamble referred provided:

> Nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of the public domain. Act of February 22, 1889, ch. 180, 25 Stat. 676 (emphasis added).

The Committee of Indian Affairs first suggested the school provision when the bill was pending before it, even though Senator Gamble felt that the provision itself was superfluous as the grant to the state would become operative without further legislation when, in his words, the "reservations were opened, as in this case, and became a part of the public domain . . . ." 35 Cong. Rec. 4856 (1902).

Admittedly Congress, at the time of this debate, had not yet abandoned the policy to which plaintiff refers to in its brief at 29-31, and so the "public domain" and "extinguished reservation" concept is understandable. After all, Congress was concerned with the original 1901 lump-sum cession agreement which would have had this effect on the Rosebud Reservation. In other words, at least as far as the Rosebud Reservation is concerned, Congress had not as yet, as plaintiff again correctly states, "abandoned this policy" in favor of the "new" policy, i.e. the trustee-homestead amendment.

But why is this school land provision, founded as it is upon a provision made operative only when "the reservation shall have been extinguished and such lands restored to, and become a part of, the public domain," still present in the final act representing plaintiff's "new" policy which purportedly did not diminish or extinguish reservations? And what is Congressman Burke doing explaining the school land provision to the House of Representatives on January 30, 1904, after the adoption of the new policy, in not only the same descriptive terminology of the old policy which plaintiff has argued has been abandoned, but also in terms of the same diminutive or extinguishing concept the old policy would have had on the reservation!

> Mr. FINLEY: Mr. Speaker, I observe that in section 4, reserving school lands, it is provided that the government pay for those lands. Is that the usual appropriation that is put in all bills of this character?

Mr. BURKE: I am glad that the gentleman has asked me that question. I would state that under the enabling act under which the State of South Dakota was admitted to the Union it was provided that sections 16 and 36 in said State should be reserved for the use of the common schools of that State, and it further provided that as to the lands within an Indian reservation the provisions of that grant would not become operative until the reservation was extinguished and the land restored to the public domain. That enabling act was passed by Congress on the 22nd day of February, 1889. In March of that same year Congress ratified a treaty with the Sioux Indians in South Dakota for the cession of something like ten or eleven millions of acres of land, and made an express appropriation, in accordance with provisions of the enabling act, to pay outright out of the Treasury the money for sections 16 and 36 of that land at the price stipulated for in the treaty.

Mr. FINLEY: Then, as I understand the gentleman, he bases the wisdom or equity for this provision upon the enabling act admitting South Dakota into the Union.

Mr. BURKE: Yes.

Mr. FINLEY: And not otherwise?

Mr. BURKE: No. 38 Cong. Rec. 1423 (1904) (emphasis added).

Precisely the same underlying reason for the inclusion of this school land provision in the final act, namely that the act would extinguish that portion of the reservation and hence make operative the enabling act, is also given in all of the House and Senate Reports submitted after the adoption of plaintiff's "new" policy:

> The bill also provides that sections 16 and 36 or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and an appropriation of $90,000 is made for this purpose. This provision is in conformity with the guarantee given to the State of South Dakota by Congress in the enabling act, which provided that any reservations open to setttlement subsequent to the admission of the State into the Union, that sections 16 and 36 would be reserved and ceded to the State for school purposes. H.R. Rep. No. 3839, 57th Cong. 2d Sess. 2 (1903).
>
> The bill also provides that sections 16 and 36, or the equivalent of two sections in every township,shall beceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and an appropriation of $90,000 is made for this purpose. This provision is in conformity with the guarantee given to the State of South Dakota by Congress in the enabling act, which provided that in any reservations open to settlement subsequent to the admission of the State into the Union, that sections 16 and 36 would be reserved and ceded to the State for school purposes. S. Rep. No. 3271, 57th Cong. 2d Sess. 2 (1903).
>
> Section 4 of the bill provides that sections 16 and 36, or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and section 5 provides for an appropriation of $90,000 for this purpose. This is in conformity with the guaranty given to the State of South Dakota by Congress in the enabling act, which provides that in any reservations opened to settlement subsequent to the admission of the State into the Union sections 16 and 36 would be reserved and ceded to the State for school purposes. H.R. Rep. No. 443, 58th Cong., 2d Sess. 2 (1904).
>
> Section 4 of the bill provides that section 16 and 36, or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and section 5 provides for an appropriation of $90,000 for this purpose. This is in conformity with the guaranty given to the State of South Dakota by Congress in the enabling act, which provides that in any reservation opened to settlement subsequent to the admission of the State into the Union sections 16 and 36 would be reserved and ceded to the State for

> school purposes. S. Rep. No. 651, 58th Cong., 2d Sess. 2 (1904).

The connotation of the "open to settlement" terminology has been discussed at 13-14, supra.

C. THE FINAL REPORTS: SENATE REPORT NO. 651 AND HOUSE REPORT NO. 443

Senate Report No. 651 and House Report No. 443 are one and the same, as the Senate Committee on Indian Affairs deemed the subject matter of the measure to be so "fully covered" (S. Rep., supra at 1) by House Report No. 443, they adopted it in its entirety. The report and appended materials consist of some 12 pages that relate, in detail, the history of the Gregory County Act. Although the counties deem the entire report to be extremely significant and have in fact discussed certain aspects of it elsewhere in this brief, only two areas will be examined at this point. Keeping in mind that the general purpose of this subsection was to show that Congress never intended that the trustee-homestead amendment would in any way affect the diminution of the Rosebud Reservation which would have occurred had the original 1901 lump-sum cession agreement been ratified, the counties note and deem significant the following paragraph:

> There is no question but what the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, which will be left compact and in a square tract and a reservation about equal in size to the Pine Ridge Reservation, in South Dakota. S. Rep., supra at 3 (emphasis added).

This paragraph, especially when considered in connection with not only the tenor of the Commissioner of Indian Affairs testimony before the House Committee, but also the specific reply he made when asked about the advisability of consent (i.e., "If you wait for their consent in these matters, it will be fifty years before you can do away with the reservations.") (S. Rep., supra at 4-5, [emphasis added]) which was also reproduced in the report proper,[7] not only deals with the precise effect the 1904 Act was to have on the Rosebud Reservation, but also serves to put the issue in what the counties would term a proper historical perspective.

Both reports represent the final word of the Senate and House Committees on Indian Affairs, and in effect, of Congress itself.

The House passed the bill on February 1, 1904, after a short explanation by Congressman Burke, the significant portion of which has already been discussed in this brief. On April 18, 1904, the entire report was first read by the Secretary, and the bill passed the Senate without any discussion whatsoever.

V. THE DOCUMENTS AND STATUTES CONCERNED WITH GREGORY COUNTY AFTER THE PASSAGE OF THE 1904 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED

One would logically assume that if, after the 1901 agreement had been amended to include the trustee-homestead provision, a portion of the reservation was still to be "cut off," "extinguished,"

[7] By "report proper," the counties mean that portion of the report exclusive of the appended material.

and "restored to the public domain" and that portion remaining to be left "compact and in a square tract" and "still as large as" or "about equal in size to the Pine Ridge Reservation," as Inspector McLaughlin, Congressman Burke, Senator Gamble, and the language and provisions of the act itself indicated, there should be some confirmation of this diminutive effect in documents and statutes concerned with Gregory County and the Rosebud Reservation after the act had been passed and proclamation issued. C.T. at 22 (1903); 38 Cong. Rec. 1423 (1904); H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904). (Cited sources describing the effect of the 1901 agreement after it had been amended to include the trustee-homestead provision i.e., the 1904 Act.)

The counties submit that, in its entirety, the judiciary could not expect a more relevant, consistent, clear, immediate and unequivocal confirmation of this sort than the 1905 "extension" statute and peripheral materials concerned therewith.

1. 1905 Extension Statute

   a. S. Rep. No. 2760, 58th Cong., 3rd Sess. 1 (1905):

   > The Committee on Public Lands, to whom was referred the bill (S. 5799) to provide for the extention of time within which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, S.Dak., having had the same under consideration, beg leave to report the bill back with the recommendation that it be amended, and that as amended it do pass . . . .
   >
   > The portion of the Rosebud Indian Reservation which was subject to the legislation provided by the act of April 23, 1904, was thrown open for settlement by the proclamation of the President of the United States under date of May 13, 1904 . . . (emphasis added).

   b. H. R. Rep. No. 4198, 58th Cong., 3rd Sess. 1 (1905):

   > The Committee on the Public Lands, to whom was referred the bill (S. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, S. Dak., having had the same under consideration, beg leave to report the bill back with the recommendation that it do pass.
   >
   > The portion of the Rosebud Indian Reservation which was subject to the legislation provided by the act of April 23, 1904, was thrown open for settlement by the proclamation of the President of the United States under date of May 13, 1904 . . . (emphasis added).

   c. 39 Cong. Rec. 1578 (1905) (remarks of Senator Gamble on S. 5799 on Jan. 30, 1905):

   > Extension of Time to Homestead Settlers.
   >
   > Mr. GAMBLE. I ask unanimous consent for the present consideration of the bill (S. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, S. Dak . . . (emphasis added).

   d. Act of February 7, 1905 (S. 5799) ch. 545, 33 Stat. 700: An Act To provide for the extension of time within which homestead settlers may establish residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, South Dakota, ...
   >
   > Be it enacted . . ., That the homestead settlers on the lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, South Dakota, opened

> under An Act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provisions to carry the same into effect, approved April twenty-third, nineteen hundred and four. . . be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened . . . (emphasis added).

   e. 33 L.D. 408 (1905):

   > Instructions. Department of the Interior,
   > General Land Office,
   > Washington, D.C., Feb. 9, 1905.
   >
   > Register and Receiver,
   >
   > Chamberlain, South Dakota. . . .
   >
   > Gentlemen: The Act of February 7, 1905, provides –
   >
   > That the homestead settlers on the lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, South Dakota, opened under an act entitled "an Act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation . . . ." be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened and filed upon until the first day of May, anno Domini nineteen hundred and five . . . .
   >
   > You will see that as to lands in the former Rosebud Reservation, ... this act is given effect in your office as to all entries made of such lands prior to November 1, 1904.
   >
   > W. A. Richards, Commissioner.
   >
   > Approved: E. A. Hitchcock,
   > Secretary
   > (emphasis added).

Other miscellaneous documents which also attributed this same diminution to the 1904 Act include:

2. 33 L.D. 124 (1904):

   > Instructions. Department of the Interior,
   > General Land Office, Washington, D.C.,
   > July 19, 1904.
   >
   > Register and Receiver,
   >
   > Chamberlain, South Dakota.
   >
   > Sirs: All persons who apply to enter lands within the former Rosebud reservation, ...
   >
   > W. A. Richards, Commissioner.
   >
   > Approved: Thom. Ryan
   > Acting Secretary
   > (emphasis added).

3. Department of the Interior, Indian Affairs Ann. Rep. , Report of Agent for Rosebud Agency, Chas. E. McChesney, Agent, 334 (1904):

   > Sir: I have the honor to submit the annual report of this agency for the year ending June 30, 1904:
   >
   > The Rosebud Reserve embraces about 2,700,000 acres of land, situated entirely within the State of South Dakota, and extends from the Nebraska State line on the south to the White River on the north and from the Pine Ridge Reserve lines on the west to the range line between ranges 73 and 74 west, fifth principal meridian, on the east. All the land formerly belonging to this reserve east of the above range line is now open to settlement under

an act of Congress passed at the last session thereof. The opened portion includes about 416,000 acres (not counting the Indian allotments) and is the major part of Gregory County, S. Dak . . . (emphasis added).

4. FOURTH ANNUAL REVIEW OF THE PROGRESS OF SOUTH DAKOTA FOR 1904, III STATE DEPT. OF HISTORY, SOUTH DAKOTA HISTORICAL COLLECTIONS 21 (1906):

The State Historical Society takes pride in presenting herewith its Fourth Annual Review of the Progress of the State, and congratulates South Dakota upon continued excellent conditions and another year of prosperity and happiness.

Two circumstances, each unique in itself, have made the year notable in this state. The first of these was the opening of a portion of the Rosebud Indian Reservation to settlement, and the remarkable rush of homeseekers who desired to secure locations upon these fertile lands. The section opened by act of congress comprised about 416,000 acres of Gregory County, off of the east end of the reservation . . . (emphasis added).

5. C. T. at 4-5 (Dec. 1906):

Inspector McLaughlin: . . . There is no railroad running over any portion of the Rosebud Reservation, none within the boundaries of your reservation. That railroad in Gregory County has not yet come across your reservation boundary, but should it come into your reservation, you would receive pay for its right of way. Any of the Indians who may live in Gregory whose allotments have been crossed by that railroad, have, or will receive pay for the privilege of crossing their allotments, so you need not worry about that, my friends.

6. YESTERDAY AND TODAY: A HISTORY OF THE CHICAGO AND NORTHWESTERN RAILWAY SYSTEM, at 133 (1910). The following quotation from the annual report for fiscal year 1906 appears therein:

The company had also undertaken the construction of an extension from Bonesteel, South Dakota to Gregory, South Dakota, a distance of 25.93 miles, and would be complete during the ensuing fiscal year. This extension will pass through Gregory County, which embraces that portion of the Rosebud Indian Reservation opened to settlement in 1904, and will terminate near the present eastern boundary of that reservation (emphasis added).

7. 38 L.D. 214 (1909):

First Assistant Secretary Pierce to the Commissioner of the General Land Office, September 20, 1909 . . . .

. . . The land embraced in said entry is a part of the former Rosebud Indian Reservation opened to entry and settlement August 8, 1904, by proclamation of May 13, 1904 . . . (emphasis added).

8. Department of the Interior, Secretary of the Interior, Ann. Rep. 34 (1917):

Public Sales have been announced to take place during the coming season . . . of unsold lands in the former Rosebud Reservation in Gregory County, South Dakota (emphasis added).

This list of "former" references is not and was not intended to be complete in the sense that it includes all references of a later date concerned with the Gregory County opening. Nor is it intended that because of the "former" references such an intention must be "imputed" back to the 1904 Congress. Rather, the references are merely intended as a confirmation that the diminutive effect attributed to the 1904 act before passage, was recognized after the act was effective.[8]

Although it is the counties' position that the legislative history and the text of the 1904 Act, considered together and in their entirety, are sufficient to show that the 1904 Act was intended to

[8]The 1907 and 1910 confirmation sections are intended to be equally within the purposes and limitations stated in this paragraph.

diminish the Rosebud Reservation, certain related arguments do merit some discussion at this point.

Primarily, these arguments center around the "on, in, within," vs. "former, heretofore" controversy apparent in the briefs submitted to and in the opinions of, the courts which have construed acts similar to those in this case. To date, this controversy has been primarily limited to the language of the acts, proclamations, and a few later passed statutes, for the simple reason that these were the only materials presented. What little legislative history that some of the briefs did contain was presented in such a way as to not put the court in a position of having to weigh or consider the issue in its proper context.

In connection with the Gregory County Act and Proclamation, the controversy never really completely manifests itself. In the 1904 Act, Congress used the operative language "echoing an abandoned" (B.P. at 30) policy and that language is really not susceptible to the "preposition" argument. However, it is interesting to note that at 44 of plaintiff's brief is a list of four prepositions appearing in the 1904 Act. In light of the fact that all are in Article IV, however, which is the Article IV of the original 1901 lump-sum cession agreement in quotations (which plaintiff has conceded would have diminished the Rosebud Reservation), the counties submit that whatever probative value the "preposition" argument might have in other instances is completely lacking here.

The 1904 Proclamation contains the operative language echoing the same abandoned policy and hence plaintiff has not even attempted to subject it to the "preposition" argument. A detailed discussion of the other phases of preposition argument will be set forth after the Tripp and Mellette County materials have been examined.

1907 ACT[9]

If the counties' position as to the effect of the 1904 Act on the size of the Rosebud Reservation is correct, the materials surrounding the 1907 Act should not only independently support this position but should also indicate a similar effect was intended by the 1907 Act itself. Since the 1907 documents enable one to view the effect of the homestead acts on the Rosebud Reservation both retrospectively and prospectively, they will be analyzed from that vantage point. The format will consist of the same four interrelated subheadings used in the discussion of the Gregory Act.

I. THERE IS STILL NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE TRUSTEE-HOMESTEAD AMENDMENT WAS INTENDED TO AFFECT THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

The pillar of plaintiff's new policy, the trustee-homestead amendment, had been in effect for three years on the Rosebud Reservation and was about to be implemented again. Yet not one paragraph appears in any of the contemporary documents that clearly supports plaintiff's concept of a reservation. Even in light of the fact that three years had passed since the "new policy" was applied to the Rosebud Reservation, one would expect at least some sort of casual remark or other manifestation from someone.

II. THERE IS ADDITIONAL EVIDENCE THAT THE ONLY REASON FOR THE TRUSTEE-HOMESTEAD AMENDMENT WAS AN APPROPRIATION CONFLICT WHICH WAS NOT IN ANY WAY CONCERNED WITH THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

There is very little material even concerned with this aspect of the legislation--a fact which in and of itself supports the position taken by the counties. And as a corollary thereto, the reference that does appear is consistent with the material on this point previously presented.

> Hollow Horn Bear. . . . I want the Great Father's council to pay for this land at $5 per acre straight, to guarantee it . . . .
>
> Inspector McLaughlin. In reply to my friend Hollow Horn Bear, I desire to say there is very little difference in his proposition and what I am prepared to consider. The principal difference is that he demands $5 an acre for the entire cession and for the Government to guarantee the payment of that price. As to that, I wish you to clearly understand that Congress for the past 5 years has absolutely refused to consider any agreement for the cession of Indian reservation lands which stipulates a lump sum payment or binds the Government in any way to purchase the land or find purchaser for it. C.T. at 29, 30 (1906).

This is the only reference to plaintiff's "new policy" that appears anywhere in 1906 and 1907 Tripp County documents.

[9] Act of March 12, 1907, 34 Stat. 1230--all of Tripp County, and a portion of Lyman County.

III. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE 1907 ACT WAS INTENDED TO EFFECT A SIMILAR DIMINUTION TO THAT WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP SUM CESSION AGREEMENT AND WHICH DID FOLLOW THE 1904 ACT

A. CONTINUITY

If there is one striking characteristic that permeates all of the Rosebud materials from the conception of the original 1901 lump-sum cession agreement through the passage of the 1910 Act, that characteristic is continuity: A continuity of terminology, procedure, personnel, and most importantly, policy.

1. Terminology. The "cession" and "open" terminology continues to appear throughout the documents of the period and is used interchangeably with and equated to the "sale and dispose of" terminology. In one paragraph reference is made to "the sale of that part of Reservation located in Tripp County" and in the next to the disposal of the "land ceded," ad infinitum. Letter from F. E. Luepp, Commissioner of Indian Affairs to Inspector James McLaughlin, December 5, 1906.

2. Procedure. The Secretary of the Interior again requested the Office of Indian Affairs to "prepare instructions" for Inspector McLaughlin to enter into "negotiations with the Rosebud Indians for the cession" of certain land in South Dakota and Inspector McLaughlin was thereby detailed in the precise same manner as in 1901. Letter from F. E. Leupp, Commissioner of Indian Affairs to the Secretary of the Interior, December 5, 1906 (emphasis added). The instructions referred to fair terms, "similar to those in the disposal of the ceded lands in Gregory County." Letter to Inspector McLaughlin, supra. Inspector McLaughlin explained the purpose of his visit in the same manner: "I am here under orders of the Secretary of the Interior to submit to you a proposition for the cession of your surplus unallotted land in Tripp County." C.T. at 1 (1906). As in 1901, an agreement was reached wherein a majority of the members of the tribe agreed to "cede, grant, and relinquish to the United States all claim, right, title and interest in and to all that part of the Rosebud Indian Reservation lying . . . . S. Rep. No. 6831, 59th Cong., 2d Sess. 1 (1907) (emphasis added). Article II of the agreement provided that:

> In consideration of the lands ceded and relinquished by Article I of this agreement, the U.S. stipulates and agrees to dispose of the same, as hereinafter provided, under the provisions of the homestead and townsite laws, or by sale for cash, and shall be opened . . . . S. Rep., supra.

If the trustee-homestead policy was inconsistent with the "cede, grant, and relinquish to the United States all right, title and interest in" policy, the Secretary of the Interior, the Office of Indian Affairs and Inspector McLaughlin certainly were not aware that such a distinction should apply to the Rosebud Reservation.

The Office of Indian Affairs and the Secretary of the Interior attempted to make the legislation conform with the expectations of the Indians. Both recommended that the agreement be ratified with only those changes necessary to make it effective. S. Rep., supra at 4. On February 18, 1907, the Senate Committee on Indian Affairs concurred and Senate Report No. 6831 was submitted with the agreement basically intact. S. Rep., supra. However, at approximately the same time a bill sub-

stantially in the form of the final act has already passed the House. So the very next day the Senate Committee on Indian Affairs adopted the House bill, which was not in the "form" of the agreement, and the House report, which only appended the agreement. S. Rep. No. 6838, 59th Cong., 2d Sess. (1907). But for the fact that the other version had already passed the House, the 1907 Act could very well have ended up in the same form as the Gregory Act--a form containing the terminology of and representing a policy which according to plaintiff had long since been abandoned on the Rosebud Reservation.[10]

In any event, the fact that an agreement containing this "old" terminology was appended to and made part of the Senate and House reports is, in and of itself, significant. In addition, many of the provisions of the agreement were simply paraphrased and made a part of certain sections of the final act.[11]

3. Personnel. Many of the individuals responsible for the Rosebud legislation in 1907 were the same individuals that were responsible for the 1904 legislation. For the most part they were thoroughly familiar with the history of the Rosebud legislation, some even from the time of the 1901 agreement. In this light, the references to and provisions of the acts which are inconsistent with the continued existence of certain portions of the Rosebud Reservation become even more of an anomaly. See Note 6, supra.

In all instances, the 1907 bill and agreement were referred to as being "the same as" or "in line with" or substantially "similar to" the 1904 Act. C.T. at 31 (1906); 41 Cong. Rec. 3104 (1907); Letter to Inspector McLaughlin, supra. And the 1904 Act was consistently referred to by these men in such a manner as to leave little doubt that Gregory County was simply no longer considered to be a part of the Reservation. For example, there is Inspector McLaughlin's comment about the railroad set forth at 20 supra, and also the continual reference to Tripp County, not Gregory County, as the eastern part of the Reservation:

> High Pipe: The best land we have is in the eastern part of our reservation, Tripp County. C. T. at 8 (1906) (emphasis added).

The agreement itself, the House and Senate Documents, and the Congressional Record also support this conclusion:

---

[10] Perhaps the reason why the House did not ratify the agreement in toto was that it had to be amended. In such a case, Inspector McLaughlin has succinctly stated in the very last paragraph of his report that:

> I desire to add that quite a number of the Indians before signing the agreement expressed themselves as fully concurring in all its provisions, but wanted it distinctly understood that should the agreement fail of ratification just as it was written, they did not wish their names transferred to appear as concurring in H.R. bill 20627, 58th Congress, 2d Session, or any other bill of a similar character, which they imagined was done with their signatures to the unratified agreement of September 14, 1901, when Gregory County lands were opened by the Act of April 23, 1904. Letter from Inspector James McLaughlin to the Secretary of the Interior, February 12, 1907.

[11] The articles in the agreement were prefaced with "It is further agreed . . ." and "It is understood . . ." In all instances these phrases were deleted in the final act with the sections therein simply beginning with "That . . ." In many instances the remainder of the provisions were then retained in toto. For example, compare the school land provision in the agreement and the final act. In essence, as Congressman Burke stated, the whole act was "substantially in accordance with an agreement which has just been made with the Indians . . ." 41 Cong. Rec. 3104 (1907).

> cede, grant, and relinquish to the United States all claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation lying south of Big White River and east . . . . S. Rep. No. 6838, 59th Cong., 2d Sess. 4 (1907) (emphasis added).
>
> The purpose of this bill is to authorize the opening and sale of that portion of the Rosebud Reservation in South Dakota known as Tripp County, and it affects all that portion of the reservation east of range 25 of the fifth principal meridian south of the Big White River, and embraces about 1,000,000 acres.
>
> In the second session of the Fifty-eighth Congress a law was passed authorizing a sale of so much of this same reservation as was located in Gregory County, the tract affected being about one-half the area embraced in the tract affected by the pending bill and lying immediately adjoining and east of Tripp County. H.R. Rep. No. 7613, 59th Cong. 2d Sess. 1 (1907) (emphasis added).
>
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Congressman Burke's comment, discussed at 27, infra.

Gregory County was not a part of the Reservation in 1907 and as the material in the next sections indicate, Tripp County would soon be similarly located.

B. THE CENTRAL THEME

The three sources cited below are an example of what the counties have attempted to stress throughout this entire section: that the central theme present in all of the Rosebud documents of this period is a concept of a reservation already diminished by one act, and soom to be diminished by another.

1. Commissioner of Indian Affairs. On December 15, 1906, F. E. Leupp, the Commissioner of Indian Affairs, submitted a 12 page report to the Secretary of the Interior on a bill that was then pending to dispose of that part of the Rosebud Indian Reservation in Tripp County, South Dakota. On the last page therein, he stated in simple and concise terms that:

> I have heretofore said in substance that, in my judgment, it is a mistake for Congress to direct the restoration of the surplus lands of an Indian Reservation to the public domain without first referring the question to the Indians . . . . Letter from F. E. Leupp, Commissioner of Indian Affairs to Secretary of the Interior, December 15, 1906 (emphasis added).

If the presence of the trustee-homestead provision in the Rosebud legislation was inconsistent with the restoration of lands to the "public domain," and hence inconsistent with the doing away with reservations, someone certainly should have communicated this information to the Commissioner of Indian Affairs. In addition, the counties would submit that the probative value of statements such as this is enhanced by the fact that this Commissioner was not a novice in these matters. Indeed, this is the same Commissioner who used the "doing away with reservations" terminology after the adoption of the trustee-homestead provision while testifying before the House Committee on Indian Affairs in 1904, which was included, along with his report on the final draft on the 1904 Act, in both the 1904 Senate

and House Reports.

2. The School Land Provision. Section 6 and 7 of the 1907 Act specifically provided that certain lands granted to the state be paid for by the Federal Government. The members of the House and Senate who were not as familiar with the Rosebud legislation as others more directly involved, were consistently and in all instances given the same explanation for this appropriation. A portion of the reservation would be extinguished by the 1907 Act (Tripp County), as portions thereof had been extinguished before, and a section of the enabling act required in such cases that land then be granted to the state. When Congressman Burke presented the bill to the House the following exchange took place:

> Mr. Finley. Does not the gentleman think that the State of South Dakota should have land for school purposes, as is provided in the bill, and that the Government should pay for the land?
>
> Mr. Burke of South Dakota. I will answer that question by stating that in at least six different instances since South Dakota was admitted into the Union Congress has made an appropriation and paid for the school sections under the guaranty that was given to the State when we came into the Union.
>
> Mr. Finley. Why is that where certain sections have been allotted or patented the Government is called upon to pay for sections 16 and 36?
>
> Mr. Burke of South Dakota. That refers to sections that have been allotted to the Indians, and it has always been the custom where school sections have been allotted to give to the State in lieu of such sections other sections, not exceeding two in any township.
>
> Mr. Finley. Is it true that some of these lands have been allotted to the Indians?
>
> Mr. Burke of South Dakota. It is true that a portion of the lands have been allotted to the Indians.
>
> Mr. Finley. Does the gentleman think the Government should be called upon to pay to the State of South Dakota for lands allotted to the Indians? Doesn't the land belong to the Indians? I ask the gentleman if that practice has been the usual one?
>
> Mr. Burke of South Dakota. We have heretofore appropriated to pay for sections 16 and 36 in every township, or where they had been taken to pay for a section in lieu thereof.
>
> Mr. Finley. Has that been the rule where lands are allotted to Indians?
>
> Mr. Burke of South Dakota. Yes; that has been the rule and was the rule in the former Rosebud bill which passed the Fifty-eighth Congress, and is exactly in line with this provision, and the price is the same. 41 Cong. Rec. 3104 (1907).

Although Congressman Burke could have explained the necessity for the inclusion of such a provision more succintly as he had in other instances, an examination of the House and Senate reports reveals why such a detailed statement in this instance would have been superfluous. One entire page of each of these reports is devoted to this very question:

> Section 6 of the bill reserves sections 16 and 36 in each township for the use of the common schools, and grants the same to the State of South Dakota, and section 7 makes an appropriation to pay for the same at $2.50 per acre. This is following the precedents which have heretofore been established in the opening of other reservations in South Dakota, and is based upon section 10 of the act of Congress admitting South Dakota into the Union, approved February 22, 1889. Said section is as follows:
>
> SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed

> States, and where such sections, or any part thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants nor indemnity provisions of this act, nor shall any lands embrace.. n Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands restored to and become a part of the public domain.
>
> The following are the precedents:
>
> By section 30 of the act opening and dividing the Great Sioux Reservation, sections 16 and 36 were granted to the State, and an appropriation of $1.25 per acre was made to pay for same. Act approved March 2, 1889. (25 Stat. L., 898.)
>
> By section 30, act approved March 3, 1891, opening the Sisseton and Wahpeton Reservation, the school sections were ceded to the State and an appropriation made, and the same were paid for at $2.50 per acre. (26 Stat. L., 1039.)
>
> By act of August 15, 1894, opening the Yankton Reservation, the school sections were ceded to the State and paid for at $3.75 per acre. (28 Stat. L., 313.)
>
> Act providing for sale of Rosebud Reservation, in Gregory County, school sections were ceded and paid for at $2.50 per acre and act authorizing sale of a portion of the Lower Brule Reservation, first session of the (Fifty-ninth) Congress, school sections were ceded to the State and paid for at $1.25 per acre. H.R. Rep. No. 7613, 59th Cong., 2d Sess. 3-4 (1907); S. Rep., No. 6838, 59th Cong., 2d Sess. 3 (1907) (emphasis added).

Whether one prefers the "opening" of the 1889 Reservation or the "sale" and "cede" of the 1904 Gregory County Act or whatever, the 1907 Act was intended by Congress to extinguish that portion of the Rosebud Reservation lying in Tripp County and restore it to the public domain in the same manner that the acts listed as "precedents" had extinguished and restored portions of other South Dakota Reservations to the public domain! It is with this in mind, as well as Commissioner Leupp's statement, that we now turn back to a comment made by Congressman Burke on the floor of the House.

3. The Congressional Record. Certain statements appear throughout the Rosebud documents that the counties submit are susceptible of only one interpretation when viewed in their proper historical perspective and in light of the information stated in the other contemporary documents dealing with that reservation. Congressman Burke made just such a statement on the floor of the House on February 16, 1907:

> The Indians, as I have stated before, have agreed to the disposition of it under the terms of the bill. They will have left, after this land is disposed of, a reservation that is substantially 50 miles square, and there are only 5,000 Indians. 41 Cong. Rec. 3104 (1907) (emphasis added).

This statement is the perfect example of how the serial effect of the Rosebud homestead acts can be viewed both retrospectively and prospectively. Retrospectively, Gregory County was no longer a part of the reservation. Prospectively, Tripp County would soon be similarly located. The materials in the next section are listed merely to confirm this observation.

IV. THE DOCUMENTS AND STATUTES CONCERNED WITH TRIPP COUNTY AFTER THE PASSAGE OF THE 1907 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED AGAIN.

1. 37 L.D. 124 (1909):

OPENING OF ROSEBUD INDIAN LANDS IN SOUTH DAKOTA (TRIPP COUNTY).

Regulations

Department of the Interior
Washington, D.C., Aug. 25, 1908.

The Commissioner of the General Land Office.

Sir: Pursuant to the proclamation of the President issued August 24, 1908, for the opening to settlement, occupation, and entry of certain lands formerly within the Rosebud Indian Reservation in the State of South Dakota, under the act of Congress approved March 2, 1907 (34 Stat., 1230) . . . .

Very respectfully,

Jesse E. Wilson,
Acting Secretary
(emphasis added).

2. EIGHTH ANNUAL REVIEW OF THE PROGRESS OF SOUTH DAKOTA FOR 1908. V. STATE DEPT. OF HISTORY, SOUTH DAKOTA HISTORICAL COLLECTIONS 45 (1910):

Perhaps the most noteworthy event of the year 1908 in South Dakota has been the opening to settlement of the unallotted lands in Tripp County, formerly a portion of the Rosebud Indian Reservation. Pursuant to an act of Congress providing for the opening of these lands, the President in September issued his proclamation, directing that from October 7 to October 17 parties desiring to locate homesteads upon the Tripp County lands be permitted to register for the chance of drawing a homestead at Dallas, Bonesteel, Chamberlain or Presho, and during the period designated 114, 769 registrations were made, though there were but about four thousand homesteads available. The registrations exceeded the former rush to Gregory county lands in 1904 by more than eight thousand . . . (emphasis added).

3. Report of the Commissioner of Indian Affairs, Annual Report of the Rosebud Agency, C.L. Ellis, Agent, 21 - 27 (1909):

The Rosebud agency is located on the southern boundary of South Dakota. Originally the reservation extended to the Missouri river on the east, a distance of 150 miles east and west, and 50 miles north and south, and contained about three and one-quarter million acres of land. By the act of April 23, 1904, that part now known as Gregory County, on the eastern end of the reservation, was ceded and the surplus or unallotted lands made available for homesteads. Under the act of March 2, 1907 (Public No. 195), a tract about 33 miles east and west and 50 miles north and south, known as Tripp County, and east of the present diminished reservation was opened to settlement . . . .

What is now known as the diminished reservation is a tract about 50 miles square embracing the western part of the original reservation . . . .

If the whole of the diminished reservation was attached to Tripp County for judicial purposes it would be much more convenient and expeditious . . . .

The diminished reservation, containing about 2500 square miles, is wholly a cattle range at present . . . .

The burning of the grass on a great part of Tripp County early last winter found

many of the cattlemen's stock to seek grass on the diminished reserve . . . .

In order to keep the cattle of the diminished reservation from becoming reinfected by mingling with outside stock I have asked authority for material and labor to complete the south fence line, and to construct a fence along the Tripp County line to the 10th Parallel. Many thousands of posts and much labor have been expended in repairing the fences on the other three sides of the reservation this season and they are now in good condition.

All the other day schools are located in the diminished reservation . . . .

Many new towns have sprung up near the reservation boarders and in Tripp County . . . .

C.L. Ellis,
Special Indian Agent
in charge
(emphasis added).

4. Report of the Commissioner of Indian Affairs, 42 (1909):

Rosebud, S. Dak.--This reservation has been diminished very rapidly within the last few years by various acts of Congress . . . .

Respectfully,

Robert G. Valentine
(emphasis added).

5. Act of Aug. 17, 1911, ch. 22, 87 Stat. 21 (S. 3152):

Be it enacted . . . That any person who has heretofore made a homestead entry for land in what was formerly a part of the Rosebud Indian Reservation in the State of South Dakota, authorized by the Act approved March second, nineteen hundred and seven . . . (emphasis added).

6. S. Rep. No. 115, 62nd Cong., 1st Sess., (1911), containing a letter dated August 2, 1911, from Samuel Adams, acting secretary of the Interior to Hon. Charles H. Burke, House of Representatives. Mr. Adams proposed a version of a bill to extend relief to settlers who had entered lands in Tripp County, South Dakota. The proposed bill read in part:

> That any person who has heretofore made a homestead entry for land in what was formerly a part of the Rosebud Indian Reservation in South Dakota, authorized by act approved, March second, nineteen hundred and seven, may apply to the register and receiver of the land office in the district in which the land is located, for an extension of time in which to make payment (emphasis added).

7. 47 Cong. Rec. 3841 (1911):

Mr. Burke of South Dakota. . . . Mr. Speaker, the bill H.R. 13044, which is the bill now under consideration, you will notice, proposes to affect lands in what was formerly the Rosebud Reservation and the Cheyenne and Standing Rock Reservations in North and South Dakota. The bill as amended in committee eliminates the Cheyenne and Standing Rock Reservations in North and South Dakota, because of no emergency existing as to those reservations at the present time (emphasis added).

8. 40 L.D. 54 (1911):

NEWTON DEXTER BURCH.

Decided April 26, 1911.

ROSEBUD INDIAN LANDS -- SOLDIERS' ADDITIONAL RIGHT.

Lands in the former Rosebud Indian Reservation opened by proclamation of August 24, 1908, under the act of March 2, 1907, to disposal under the general provisions of the homestead and townsite laws, are not subject to appropriation by location of soldiers' additional right.

PIERCE, First Assistant Secretary:

Newton Dexter Burch has filed appeal from decisions of January 18, 1911, by the Commissioner of the General Land Office, holding for cancellation the final certificate and rejecting his several applications filed on or about October 8, 1909, under sections 2306 and 2307, R.S., for the different subdivisions of the SW 1/4 of Sec. 27, T. 101 N., R. 76 W., 5th P.M., containing 160 acres, Gregory, South Dakota, land district. The said tracts are a part of the former Rosebud Indian Reservation, opened by proclamation of the President, dated August 24, 1908 (37 L.D., 122), under the act of March 2, 1907 (34 Stat., 1230) . . . (emphasis added).

9. 40 L.D. 267 (1911):

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., September 8, 1911.

Register and RECEIVER,
Gregory, South Dakota.

GENTLEMEN: Your attention is directed to the provision of the act of Congress, approved August 17, 1911, (Public--No. 22), entitled "An act extending the time of payment to certain homesteaders in the Rosebud Indian Reservation, in the State of South Dakota," which reads as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has heretofore made a homestead entry for land in what was formerly a part of the Rosebud Indian Reservation, in the State of South Dakota, ...

Very Respectfully,

John McPaul

Approved Samuel Adams,
Acting Secretary
(emphasis added).

10. Act of Jan. 11, 1915, 33 Stat. 792:

> AN ACT Providing for the purchase and disposal of certain lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County, formerly a part of the Rosebud Indian Reservation in South Dakota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County in what was formerly within the Rosebud Indian Reservation in South Dakota, as have heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such mineral lands (emphasis added).

11. 52 Cong. Rec. 453 (1914):

Mr. Burke of South Dakota. I will state that this bill originally as introduced, or a

similar bill, was limited to Tripp County, what was formerly part of the Rosebud Reservation . . . .

. . . so that it will be limited to lands in Tripp County, in what was formerly within the Rosebud Indian Reservation . . . .

. . . so that the bill will be limited to lands in Tripp County formerly within the Rosebud Indian Reservation (emphasis added).

12. 44 L.D. 195 (1915):

TRIPP COUNTY MINERAL LANDS--ACT JANUARY 11, 1915.

INSTRUCTIONS.
(No. 425.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, July 15, 1915.

REGISTER AND RECEIVER,
United States Land Office,
Gregory, South Dakota.

SIRS: 1. The act approved January 11, 1915 (38 Stat., 792), provides that all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County, in what was formerly within the Rosebud Indian Reservation in South Dakota, as have heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such mineral lands, ...

Very respectfully,

Clay Tallman,
Commissioner.

Approved, July 15, 1915:
A. A. Jones
First Assistant Secretary
(emphasis added).

13. 44 L.D. 325 (1915):

EDITORIAL NOTE

In connection with the foregoing regulations as printed in pamplet form there were added, as an appendix, for information and convenient reference, reprints of the instructions of . . . 44 L.D., 195, under the act of January 11, 1915, providing for the purchase and disposal of certain lands containing kaolin, kaolinite, fuller's earth, China clay, and ball clay, in Tripp County, formerly a part of the Rosebud Indian reservation, South Dakota (emphasis added).

14. Department of the Interior, Ann. Rep. of the Comm. of the General Land Office, 165 (1916):

Rosebud Indian Lands.

Unentered land within the former Rosebud Indian Reservation in Lyman and Tripp Counties, South Dakota, were offered for sale to the highest bidders for cash at Gregory, South Dakota, on September 23, 1915. The prices received ranged from $2.50 to $7 per acre. In all 5,763.71 acrrs were sold for $17,866.07. All tracts were sold. The sale was made under authority of the act of March 2, 1907 (34 Stat. 1230), and departmental regulations approved July 28, 1915 . . . .

Very respectfully,

Clay Laceman, Commissioner
(emphasis added).

15. 47 L.D. 177 (1919):

REGULATIONS FOR THE SALE OF CERTAIN LOTS IN MINNEOTA TOWNSITE IN THE FORMER ROSEBUD INDIAN RESERVATION, TRIPP COUNTY, SOUTH DAKOTA.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D.C., May 24, 1919.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Under the provisions of the act of March 2, 1907 (34 Stat., 1230), you are directed to cause the lots designated from "A" to "S" inclusive in the townsite of Minneota within the former Rosebud Indian Reservation, Tripp County, South Dakota, to be offered for sale at public outcry under the supervision of the Superintendent of Opening and Sale of Indian Lands at not less than their appraised value on June 14, 1919, ...

Alexander T. Vogelsang
First Assistant Secretary
(emphasis added).

16. Annual Rep. of the Board of Indian Commissioners to the Secretary of the Interior, Report on the Rosebud Indian Agency, South Dakota, Hugh L. Scott, 28 (1921):

. . . there are several large towns on what used to be the old reservation. The largest is Winner, [Tripp County] . . . (emphasis added).

1910 ACT[12]

The 1910 materials are the most valuable documents for presenting what the counties would prefer to term, a proper historical perspective of the Rosebud legislation. Not only is the retrospective prospective aspect discussed in the 1907 section more pronounced because of the passage of time, but also herein lies the first history of the Rosebud legislation related by those members of Congress primarily responsible for the three acts.

Again, the format for presenting the 1910 materials will consist of the same four interrelated subheadings used in the discussion of the 1904 and 1907 acts.

I. THERE IS STILL NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE TRUSTEE-HOMESTEAD AMENDMENT WAS INTENDED TO AFFECT THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP SUM CESSION AGREEMENT

In light of the fact that the documents in this section set forth the entire history of the Rosebud legislation, one would expect that the elusive concept upon which plaintiff has premised its argument would at least be mentioned somewhere in these 300 odd pages--but it is not. Indeed, the counties have been unable to locate and plaintiff has not cited even one paragraph stating this concept in any of the Rosebud documents concerned with the three acts.

II. THERE IS ADDITIONAL EVIDENCE THAT THE ONLY REASON FOR THE TRUSTEE-HOMESTEAD AMENDMENT WAS AN APPROPRIATION CONFLICT WHICH WAS NOT IN ANY WAY CONCERNED WITH THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP SUM CESSION AGREEMENT

One of the two individuals most directly involved with the Rosebud legislation from 1901 through 1910, was Congressman Burke. On April 27, 1910, on the floor of the House of Representatives, Congressman Burke confirmed what is in essence one of the counties' major premises: that the only reason for the "new policy" was an appropriation conflict which was not in any way concerned with or intended to affect the diminution issue.

> Mr. Burke of South Dakota . . . . The particular bill refers to that portion of the Rosebud Reservation in South Dakota known as Mellette County. There is contained in the tract affected by the legislation about 800,000 acres of land. The Rosebud Reservation is one of the separate reservations created out of the original Sioux Reservation by the department and, later, the act of Congress of 1889. There are about 5000 members of the Rosebud tribe. In the early nineties [1900's] a treaty was made with these Indians by which they agreed to cede to the United States so much of their surplus and unallotted lands as were located in Gregory County. The price to be paid for the lands was $2.50 an acre. Owing to objections here and elsewhere it was impossible to secure a ratification of that treaty.
>
> In the Fifty-seventh Congress, if I am correct about it, we enacted a law amending that treaty and changing it in this respect. Instead of paying to the Indian $2.50 an acre, the price agreed upon, we provided that lands disposed of in the first three months after the opening should be sold at $4 an acre; and next three months, $3 an acre; and lands disposed of after six months, $2.50 an acre; then, after four years after the opening, the

[12] Act of May 30, 1910, 36 Stat. 448--All of Mellette County.

> undisposed of lands were to be sold without any conditions as to residence or compliance with the homestead law and sold outright . . . . 45 Cong. Rec. 5456 (1910) (emphasis added).

The objections to which Congressman Burke alluded were the appropriation arguments set forth at 7-12, supra. As far as the Rosebud Reservation was concerned, this was the only change in policy.

Senator Crawford, on January 27, 1910, stated the same change in somewhat more general terms:

> Mr. Crawford . . . . By treaties negotiated from time to time, and by laws enacted from time to time, the area of lands occupied by the Indians has gradually narrowed to smaller and smaller limits, until now the lands owned by the Indians are comparitively small in quantity. They are not lands which in their possession bring any revenue whatever. They do not cultivate them. There is neither fish nor game upon them. The policy of the Government toward the Indians and toward these lands has changed in more recent years simply in this respect--that the lands be sold and the proceeds made into a trust fund, the principle forever held inviolate and the income from which is devoted to the Indians . . . . 45 Cong. Rec. 1068 (1910) (emphasis added).

It is the counties' position that in all other respects "The policy of the Government towards the Indians and toward these lands" remained the same. Not only the congressional documents and peripheral materials, but also the plain language and provisions of the 1910 Act itself, as set forth in the next section, fully support this position.

III. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE 1910 ACT WAS INTENDED TO EFFECT A SIMILAR DIMINUTION TO THAT WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP SUM CESSION AGREEMENT AND WHICH DID FOLLOW THE 1904 AND 1907 ACTS.

A. CONTINUITY

To a large extent, the continuity that has manifested itself throughout the history of the Rosebud legislation is still apparent in the documents surrounding the 1910 opening.

Some of the men concerned with the earlier Rosebud legislation were no longer in Washington, but the two most influential still remained: Senator Gamble and Congressman Burke. Inspector McLaughlin, although now presenting the proposals only to procure the Indians' views and not to obtain a signed agreement, was still negotiating with the Rosebud Indians in formal council at the Rosebud Agency.

The most striking evidence of continuity of policy can be gleaned from the remarks of various individuals and documents concerned with what then constituted the reservation. In the 1907 subsection on continuity the counties stressed that Gregory County was simply no longer considered a part of the reservation and Tripp County would soon be similarly located. The 1910 materials support this conclusion without exception.

(1) The Eastern and Northern Part. In 1901, the Indians and Inspector McLaughlin referred to Gregory County as the "eastern part" of the reservation. In 1906 the "eastern part" of the reservation was Tripp County. Now, in 1909 - 1910, the Indians and Inspector McLaughlin continually refer to certain townships located immediately west of Tripp County as the "eastern part of our reservation." C.T. at 6 (1909).

In this connection, they are joined by none other than the Secretary of the Interior, James Rudolph Garfield, who refers to this same strip of land as not only being east but also in the diminished

reservation--i.e. "on the east of the present diminished reservation." S. Rep. No. 887, 60th Cong., 2d Sess. 3 (1909) (emphasis added). (The cited source contains a letter from James Garfield, Secretary of the Interior to Robert J. Gamble, January 26, 1909.)

Corresponding to this "eastern" concept are the other references to the area to be opened by the 1910 Act as constituting the entire "northern part" or the "north part of our reservation." C.T. at 8,20 (1909).

(2) The Senate and House Documents. This same concept of precisely what the boundaries of the Rosebud Reservation encompassed was also present in Congress. In 1909 the Senate Report on the pending legislation stated that: "The present area of the Rosebud Indian Reservation aggregates 1,800,000 acres." S. Rep. No. 887, 60th Cong., 2d Sess. 1 (1909). Later, on the floor on the Senate, Senator Gamble remarked that "the Rosebud Indians have a reservation of nearly 2,000,000 acres." 43 Cong. Rec. 1679 (1909). The Senate Report of the 1910 bill reiterated that: "the present area of the Rosebud Indian Reservation aggregated about 1,800,000 acres." (S. Rep. No. 68, 61st Cong., 2d Sess. 2 [1910]), and the House report stated the same thing in more definite terms.

The counties would submit that to have a reservation with a present area of approximately 1,800,000 acres, to refer to land west of Tripp County as the east part of that reservation and Mellette County as the north part of that reservation, is to have a reservation in Congressman Burke's words "that is substantially 50 miles square" and whose boundaries could not possibly encompass either Tripp or Gregory County. Only with this concept in mind, can one grasp the full import of the Secretary of the Interior's statement that "the Rosebud Reservation has been reduced very rapidly during the last few years." Letter to Robert J. Gamble, supra.

Although primarily cited for the proposition that Mellette County was soon to be similarly located, some of the material in the next subsection should also be analyzed in retrospect as well as for the general evidence of continuity appearing therein.

B. A DIMINISHED RESERVATION

Three specific areas can be cited for the proposition the 1910 Act was to further diminish the Rosebud Indian Reservation in precisely the same manner as the 1904 and 1907 Acts: (1) The Anticipatory Statements, (2) Specific References to what was to be the Diminished Reservation, (3) Provisions of the 1910 Act.

(1) Anticipatory Statements. The counties include herein references such as:

> The present area of the Rosebud Indian Reservation aggregates 1,800,000 acres. The lands proposed to be opened to settlement under the provision of this bill embrace an area of about 900,000 acres . . . The reservation is yet large . . . . S. Rep. No. 887, 60th Cong., 2d Sess. 1,2 (1909) (emphasis added).
>
> The present area of the Rosebud Indian Reservation aggregates about 1,800,000 acres. The lands proposed to be opened to settlement under the provisions of this bill embrace an area of 830,000 acres . . . The reservation is yet large . . . . S. Rep. No. 68, 61st Cong., 2d Sess. 2 (1910) (emphasis added).
>
> The area comprised in the present bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. There will still be left a reservation containing about 1,000,000 acres . . . . H.R. Rep. No. 429, 61st

Cong., 2d Sess. 2 (1910) (emphasis added).

> Mr. Gamble. . . . The Rosebud Indians have a reservation of nearly 2,000,000 acres. A bill has been introduced and favorably reported by the Interior Department, and a unanimous report made from the Committee on Indian Affairs, under which it is proposed to open about one-half of the reservation to settlement . . . . 43 Cong. Rec. 1679 (1909) (emphasis added).

> No U.S. Indian Inspector nor any other person or persons as yet has been authorized to explain this bill to us; therefore we would like to see someone that can give us at least a word security regarding the opening of any lands upon what now constitutes our reservation. Petition by Indians of the Rosebud Reservation (signed by Todd Smith and Reuben Quick Bear) to Hon. Wm. H. Taft, President of the United States, February 25, 1910 (emphasis added).

The counties would submit that such statements "anticipate" a diminution of the reservation of the type referred to specifically in the next subsection.

2. Specific References to what was to be the Diminished Reservation. By letter of April 29, 1909, Inspector McLaughlin reported to the Commissioner of Indian Affairs that the Indians expressed "their concurrence in the opening of the northern strip, provided the two tiers of townships in the eastern part of Meyer County remain a part of the diminished reservation." Letter from Inspector James McLaughlin to the Secretary of the Interior, at 3, April 29, 1909 (emphasis added). He also told the Indians specifically that "The opening of that part of your reservation will not only increase the value of the lands in that tract, but will also add a great deal to the value of the lands in your diminished reservation." C.T. at 14, (1909) (emphasis added). Other references of this nature include, but are not limited to, the following:

> I do not believe, therefore, that the strip of land on the east of the present diminished reservation should be opened yet. S. Rep. No. 887, 60th Cong., 2d Sess. 3 (1909). The cited source contains a letter from James Garfield, Secretary of the Interior to Robert J. Gamble, January 26, 1909 (emphasis added).

> It also provides that the Secretary of the Interior in his discretion, may permit Indians who have an allotment within the area proposed to be opened to relinquish such allotments and to receive in lieu thereof allotments anywhere within the reservation proposed to be diminished. S. Rep. No. 887, 60th Cong., 2d Sess. 2 (1909) (emphasis added).

> It also provides that the Secretary of the Interior in his discretion, may permit Indians who have allotments within the area proposed to be opened to relinquish such allotments and to receive in lieu thereof allotments anywhere within the reservation proposed to be diminished. S. Rep. No. 68, 61st Cong., 2d Sess. 3 (1910) (emphasis added).

> The bill is carefully safeguarded and provides that Indians who have taken allotments in the area proposed to be disposed of may relinquish such allotments and be reallotted within the diminished reservation, if they so elect . . . .
> The area comprised in the present bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. There will still be left a reservation containing about 1,000,000 acres and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of. H.R. Rep. No. 332, 61st Cong., 2nd Sess. 2 (1910); H.R. Rep. No. 429, 61st Cong., 2nd Sess. 2 (1910) (emphasis added).

If there was no occasion for continuing a reservation larger than it would be when Mellette County was disposed of and the reservation was therefore to be diminished, one would expect the 1910 Act itself to contain not only provisions consistent with this objective but also provisions inconsistent with

the continued existence of that part of the reservation affected by the 1910 Act and indeed it does.

3. Provisions of the 1910 Act. Although the entire text of the 1910 Act is consistent with the concept of a diminished reservation, the counties will only discuss certain parts of sections 1, 2, 8, and 10 at this point.

(a) Section 8: School Lands. The history of this provision and the necessity for its inclusion in the 1901 agreement, the 1904 Act, and the 1907 Act has already been set forth in detail at 5, 29 - 34, 51 - 55, supra. Therefore, it is necessary only to state that the same reason, namely the extinguished reservation and public domain section of the enabling act which would be made operative by the 1910 Act diminishing the reservation, was given for its incorporation into the 1910 Act:

> Sections 16 and 36 of the lands in each townships are not to be disposed of, but are reserved for the use of the common schools of the State, and these lands are to be paid for by the Government in conformity with the provisions of the act admitting the State of South Dakota into the Union. S. Rep. No. 887, 60th Cong., 2d Sess. 2 (1909) (emphasis added).

> Sections 16 and 36 of the lands in each township are not to be disposed of, but are reserved for the use of the common schools of the State, and these lands are to be paid for by the Government in conformity with the provisions of the act admitting the State of South Dakota into the Union. S. Rep. No. 68, 61st Cong., 2d Sess. 3 (1910) (emphasis added).

> There is also a provision reserving sections 16 and 36 of the lands in each township for the use of the common schools of the State of South Dakota, to be paid for by the Government at $2.50 per acre. The granting of these lands to the State is in accordance with the provisions of the enabling act admitting South Dakota into the Union. H.R. Rep. No. 332, 61st Cong., 2nd Sess. 2 (1910); H.R. Rep. No. 429, 61st Cong., 2nd Sess. 2 (1910) (emphasis added).

> Mr. Gamble. . . . The Government agreed to reserve these lands and to pay for them, not only by law, but under the enabling act admitting the State of South Dakota to the Federal Union . . . .
> Mr. Crawford. . . . Sections 16 and 36, to which the Senator refers, are held from the settler, and are given to the State to keep good the pledge made to the State by the Government under the enabling act when the State was admitted into the Union . . . Mr. President, with reference to sections 16 and 36, they or their equivalent belong to South Dakota, because the Government of the United States granted section 16 and 36 to the State in the enabling act under which the State was admitted into the Union, as it has granted to states over and over again millions of acres of public domain for the establishment and maintenance of common schools. 45 Cong. Rec. 1068, 1071 (1910) (emphasis added).

(b) Section 10: Intoxicants. In the "why" section of plaintiff's brief the following question appears: "And why did Congress specifically prohibit the introduction of intoxicants into Mellette County for twenty-five years just as if that county were Indian country if it were not part of the reservation?" B.P. at 49. Although the counties think most of the questions plaintiff raises in that section of its brief are either self-explanatory or not of sufficient importance to merit an answer, the intoxicant question is an exception.

The rather obvious answer to plaintiff's inquiry is simply that Congress deemed it necessary to protect all of the individuals in Mellette County and therefore had to specifically legislate to that end because Mellette County would no longer be a part of the reservation and subject to the general law prohibiting intoxicants on reservations. The Secretary of the Interior, R. A. Ballinger, recommended

the intoxicant provision in light of the then recent Supreme Court Case of United States v. Dick, 208 U.S. 340 (1908), which held prohibitions of this nature to be constitutional even though the land was to be ceded and restored to public domain. Specifically, Mr. Ballinger stated:

> The Supreme Court of the United States in Dick v. United States (208 U.S., 340), sustained a provision prohibiting the introduction of intoxicating liquors upon lands ceded by Indians, for a period of twenty five years, but emphasized strongly the fact that the provision was for a limited period reasonable in duration. The Department doubts very much the advisability of attempting to impose upon ceded lands a perpetual prohibition against the sale of intoxicants, and also doubts the advisability of prescribing punishment for the sale of liquors in violation of the law . . . . Letter from R. A. Ballinger, Secretary of the Interior to Charles H. Burke, January 13, 1910.

In the end, Congress did not disagree nor think the request unreasonable and the provision was incorporated into the 1910 Act. Several of the comments in the Congressional Record that were directed to this provision are very interesting. For example:

> Mr. GOEBEL. I am opposed to attaching to the sale of any reservation conditions such as are proposed in this bill.
> Mr. GRONNA. Does the gentleman believe it would be safer on a reservation where liquors are permitted to be sold. Would the gentleman not buy land on a reservation where protection is given by the government, even if such reservation is located in a prohibition state?
> Mr. GOEBEL. Oh, I do not know what I would do. At present I would want to get the land without any conditions attached. You must also bear in mind that when the lands are sold there is no longer a reservation, and the laws of the states apply . . . .
> Mr. BUTLER. . . . If the land is sold it will be no longer an Indian reservation. It is where, as I understand, the Indian has always lived and where he is going to live, and I believe in keeping the sale of liquor out of his neighborhood, and for that purpose I propose in a kind and gentle way to suggest to gentlemen that if there is to be any attempt made to prevent the restraint being imposed upon this title they had better have a quorum of the House present to insure the success of the attempt. 45 Cong. Rec. 5463, 5464 (1910) (emphasis added).

Therefore, contrary to plaintiff's position, the mere presence of this provision is, in and of itself, evidence that Mellette County would no longer be a part of the reservation after the passage of the 1910 Act.

(c) Section 1: Indian Agency, School, and Other Lands. As for the land reserved as long as "agency, school, or religious institutions are maintained thereon for the benefit of said Indians" (Act, supra, Section 1) to which plaintiff also alludes, the counties can find nothing therein which is inconsistent with their position. After all, Congress was aware of the Indian population that was allotted within the "tract to be ceded" and certainly did not expect all of these individuals to "relinquish same and select allotments in lieu thereof on the diminished reservation." Act, supra, Section 1. As was the case with intoxicants, for Congress to provide for these individuals in this manner is not inconsistent with the fact that the area to be opened would no longer be a reservation.

(d) Section 4: Timber Lands. Although different reasons were given, the Congressional Record also supplies an answer to plaintiff's inquiry as to the reservation of timber lands for the use of the Rosebud Indians:

> Mr. STAFFORD. Will the gentleman explain why he recommends an exception in appraisement of mineral and timber lands?
> Mr. BURKE of South Dakota. Because they are not to be disposed of. We are reserving them. Consequently we provide that they shall not be appraised . . . .
> Mr. MONDELL. What is the gentleman's purpose in not disposing of the timber lands?
> Mr. BURKE of South Dakota. We are providing in this bill and in the other bill that is exactly in the same form for reserving the timber land for the use of the Indians as a forest. As a matter of fact, on this particular reservation there is not a single stick of timber, but the department seems to think the timber ought to be conserved, and so we put this language in the bill.
> Mr. MONDELL. You are conserving some timber that does not exist.
> Mr. BURKE of South Dakota. So far as this reservation is concerned that is true, but we are establishing a precedent that might be good to follow in other reservations where there may be timber . . . .
> Mr. BURKE of South Dakota. There is, as a matter of fact, no timber land in this reservation. We doubt if there will be found any lands that will be regarded as timber lands. But it was put in as a mere matter of precaution. 45 Cong. Rec. 5471, 5472 (1910) (emphasis added).

Even if the presence of this provision was other than merely precautionary, the counties would still be unable to discern any purpose other than one consistent with the acknowledgment by Congress of the continued presence of some members of the Rosebud Sioux Tribe in the area to be opened. In this light, the inclusion in the 1910 Act of some provisions for their benefit would seem to be entirely reasonable and not in any way inconsistent with the concept of a diminished reservation.

(e) Section I: "On the Diminished Reservation." At 45 of plaintiff's brief the following subheading appears:

> The Mellette County Act contains a phrase which renders Congress' intent regarding the future status of that portion of the Rosebud Reservation uncertain and therefore subject to the rule that doubtful expressions be resolved in favor of the Indians in statutes passed for their benefit. B.P. at 45 (emphasis as in original).

The phrase to which plaintiff refers states in simple and concise terms that:

> Provided, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation . . . . Act, supra (emphasis added).

The mere fact that plaintiff has devoted approximately six full pages of its brief in an attempt to convince the court to either totally disregard, attribute a different meaning to, or subject the phrase to some ambiguity rule, is of itself indicative of the degree of importance plaintiff attaches to this phrase. It first cites Congressman Burke's statement that the "lands were being sold by the government for the benefit of the Indian" as "legislative history" and then invokes its ambiguity rule. B.P. at 46. If that isn't sufficient plaintiff then states that:

> [T]he Rosebud Sioux Tribe maintains that the diminution referred to in the act is not a territorial diminution of the reservation in the ordinary sense of the word, but rather a diminution of the reservation only in the sense that the lands sold by the United States to settlers under the act would no longer be available to the Rosebud Sioux for future allotment or as a source of income, as they would have been but for this act. B.P. at 46.

The Rosebud Sioux Tribe might maintain this distinction exists but where, in any of the contemporary Rosebud documents, is there the slightest indication that Congress could have even understood this distinction, let alone apply it in the 1910 Act? As a matter of fact, an examination of any of the documents surrounding the 1910 Act would show not only that "diminished" was not "a lone doubtful island of language" (B.P. at 51) but also that the extraordinary "meaning" plaintiff

advances is without any foundation whatsoever.

As far as the significance which plaintiff has anticipated the counties would attach to this phrase, it has simply miscalculated. In the first place, the counties would never advocate that an issue of congressional intent be disposed of by either a casual reading of an act or the presence of an "isolated word." B.P. at 46. The whole of this brief has been constructed around the concept that if the acts are construed in their proper historical perspective and in light of all the probative evidence of congressional intent that is available, a picture of a reservation diminished by a series of acts unfolds. After all, in plaintiff's words, "This action seeks declaratory judgment as to the effect of these acts, 1904, 1907, 1910, on the size of the reservation. In truth, the action asks the court to define for the parties the present boundaries of the Rosebud Indian Reservation." A.P. at 2 (emphasis added). Of course, the counties deem significant the fact that the 1910 Act, on its face and in plain language referred to the tract as being "ceded" and the reservation as being "diminished." But it is when this phrase is viewed in conjunction with the other material, such as Congressman Burke's statement of April 27, 1910:

> Mr. BURKE of South Dakota. . . . I might say, Mr. Speaker, that there are two propositions to be considered in disposing of the unallotted and unused lands on Indian Reservations. One is, at the earliest possible date, to get among the Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms, and I believe that the placing through what were heretofore reservations actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to these allotments which at present are of very little value . . . . 45 Cong. Rec. 5457 (1910) (emphasis added).

and House Reports No. 332, 429:

> The area comprised in the present bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. There will still be left a reservation containing about 1,000,000 acres, and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of . . . . H.R. Rep. No. 332, 61st Cong., 2nd Sess. 2 (1910); H.R. Rep. No. 429, 61st Cong., 2nd Sess. 2 (1910) (emphasis added).

that the "effect of the acts" on the "size" of the Rosebud Reservation can best be realized. This is the "effect" with which the counties are concerned and which has been preserved for the Court in the materials presented herein. What probative value that should be attached to any one phrase or provision in any of this material, is for the Court to determine.

IV. THE DOCUMENTS AND STATUTES CONCERNED WITH MELLETTE COUNTY AFTER THE PASSAGE OF THE 1910 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED AGAIN

1. Report of Commissioner of Indian Affairs, 32 (1910):

> Department of the Interior
> Office of Indian Affairs
> Washington, November 1, 1910
>
> Sir: I have the honor to transmit herewith the Seventy-ninth Annual Report of the Office of Indian Affairs covering the period July 1, 1909, to June 30, 1910 . . . .

> Rosebud, S. Dak. . . . This reservation has been diminished previously be various acts of Congress, and the act of May 30, 1910 (36 Stat., 448), authorizes the disposal of a part of this reservation lying within Mellette and Washabaugh counties . . . .
>
> Respectfully,
>
> Robert G. Valentine
> Commissioner
> (emphasis added).

2. Act of March 3, 1919, 40 Stat. 1320:

   (a) Be it enacted, etc., That the Secretary of the Interior is hereby authorized to sell and convey to the White River Cemetery Co., for cemetery purposes, for a price not less than the appraised value thereof, a 10-acre tract within the former Rosebud Indian Reservation in Mellette County, S. Dak. described as the northeast quarter of the southeast quarter of the northwest quarter of section 34, township 42 north, range 29 west, sixth principal meridian, or such part thereof as may be required: Provided, however, That the tract conveyed shall be described in terms of the legal survey, the consideration to be paid to the superintendent of the Rosebud Reservation, to be deposited in the Treasury of the United States to the credit of the Rosebud Indians (emphasis added).

   (b) S. Rep. No. 745, 65th Cong., 3rd Sess. 1-2 (1919).

H.R. 12082 was introduced for the purpose of selling 10 acres of land belonging to the Rosebud Sioux Tribe in Mellette County, South Dakota, to the White River Cemetery Company. Included in the report on the bill is a letter to Hon. Charles D. Carter, Chairman, Committee on Indian Affairs, House of Representatives, from Alexander T. Vogelsang, Acting Secretary of the Interior, June 7, 1918:

> My Dear Mr. Carter: I am in receipt of your letter of May 14, 1918, inclosing (sic) for report H.R. 12082, a bill authorizing the sale of certain lands in South Dakota for cemetery purposes, and in response thereto I have the honor to submit the following:
> The bill proposes to convey for cemetery purposes a 10 acre tract within the former Rosebud Indian Reservation in Mellette County, S. Dak., described as . . . Said land was opened to settlement and entry under the act of May 30, 1910 (36 Stat. 448) which provides that the proceeds of the sale of the lands in said former Indian reservation shall be deposited to the credit of the Indians thereof and that the disposal of the land by the United States shall be in trust for their benefit . . . (emphasis added).

Although the counties were not able to locate and compile the same amount of material for the 1910 confirmation section that was presented in the 1904 and 1907 sections, we did find two references of a later date that aptly summarized the total effect of the Rosebud legislation on the size of the Rosebud Reservation.[13] In 1940, Dr. Green described that effect as follows:

> The breakup of the Rosebud Reservation began in 1904. In that year Gregory County (about 416,000 acres) was ceded. In 1907 Tripp County, with an area about twice that of Gregory County, was transferred to the Government, and opened for settlement the following year. And on May 30, 1910, Congress confirmed an agreement for the cession of all surplus lands in Mellette and Washabaugh counties belonging to the Rosebud Sioux. These three cessions lopped off approximately three-fourths of the original Rosebud Reservation and leaves, at the present time, only the area within Todd County as a closed reservation . . . . XX STATE DEPT. OF HISTORY, SOUTH DAKOTA HISTORICAL

[13] Part of the difficulty in locating material for this section was due to the fact that the counties were unable to obtain certain volumes which would have contained additional material on Mellette County. Specifically, the counties have in mind the Rosebud Agency Reports and Public Land Decisions. To a lesser degree, this was also true in the 1904 and 1907 confirmation sections. Also See Note 8, supra.

COLLECTIONS 34 - 35 (1940). The cited source contains the Doctoral dissertation of Charles Lowell Green entitled "The Administration of the Public Domain in South Dakota" (emphasis added).

On May 28, 1959, the Assistant Secretary of the Interior, Roger Ernst, in a letter to E. Y. Berry, more succintly stated:

> . . . The boundaries of the Rosebud Indian Reservation were changed to eliminate Mellette County, and to show the diminished reservation as lying in Todd County. This is shown on the map of South Dakota published by this Department in 1918. There remained, however, within Mellette County Indian allotments which were effective and did not come within the cession and opening under the 1910 act. The ceded lands fall within not only Mellette County, but the adjoinging counties within the former boundary of the original Rosebud Indian Reservation. Letter from Roger Ernst, Asst. Secretary of the Interior to E. Y. Berry, May 28, 1959 (emphasis added).

With respect to a summary statement at this point, there is very little the counties could add to Mr. Ernst's letter.[14]

[14]The 1918 map referred to in Mr. Ernst's letter, in addition to others, will be presented to the court.

PART TWO

I. THE SEYMOUR CASE

> There will still be left a reservation containing about 1,000,000 acres [Todd County], and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of. H.R. Rep. No. 429, 61st Cong. 2d Sess. 2 (1910).

In 1910 Congress dictated that this was all that would remain of the original Rosebud Reservation, and for over 60 years Todd County has been considered to be the Rosebud Reservation. It is the position of the counties that neither Seymour v. Superintendent, 368 U.S. 351 (1962), nor the other recent decisions constitute a mandate to this court that it must disregard the intent of Congress as evidenced by the passage of these three acts. The Seymour case did not hold that all acts similar to the one construed therein were not intended by Congress to diminish reservations. On the contrary, Justice Black specifically stated that:

> In United States v. Celestine, this Court said that "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." We are unable to find where Congress has taken away from the Colville Indians any part of the land within the boundaries of the area which has been recognized as their reservation since 1892. 368 U.S. at 359 (emphasis added).

Implicit in the second sentence, is a situation which certainly does not describe the Rosebud materials, for not only was the Supreme Court in Seymour unable to find evidence of congressional intent to take away from the Colville Indians any part of the land within the boundaries of the 1892 Colville Reservation, but what evidence they did find indicated that Congress consistently continued to recognize the reservation boundaries as established by the 1892 act.[15]

This is simply not the case with the Rosebud materials and even the appellant in Seymour recognized the importance of such a distinction when at 11 in his brief he stated:

> Both LaPlant and Sauter dealt with the Act of May 29, 1908, 35 Stat. 460, which authorized sale and disposition of two tracts of land of the Cheyenne River and Standing Rock Reservations in South Dakota. Section 2 of that act refers to the respective reservations as "thus diminished." The reports of the Congressional committees referred to the reservations as "diminished" and "reduced" should the bill, which became the Act of May 29, 1908, become law. S. Rept. No. 439 and H. Rept. No. 1539, 60 Cong., 1st Sess. The Act of 1908, like the Colville Act of 1906, makes the United States trustee for the Indians in sale of the lands, but there is no provision or legislative history relating to the Colville Act which shows that Congress intended to change the Colville boundaries as it did the boundaries of the South Dakota reservations. Brief for Appellant at 11, Seymour v. Superintendent, 368 U.S. 351 (1962) (emphasis added).

Nothing in the Seymour opinion can be construed in such a manner to indicate that the United States Supreme Court did not or would not continue to recognize this distinction. Indeed, the counties would submit that it was for this very reason that the opinion continually referred to only the situation

[15]"That this is the proper construction of the 1906 Act finds support in subsequent congressional treatment of the reservation. Time and time again in statutes enacted since 1906, Congress has explicitly recognized the continued existence as a federal Indian reservation of this South Half or diminished Colville Indian Reservation." 368 U.S. at 356.

that the Court found to exist in the Colville materials. In addition, there is not so much as even a footnote casting doubt upon what was then the highly regarded line of cases from the Eighth Circuit and the State of South Dakota. As a matter of fact, the only reference to any case concerned with a South Dakota reservation in the entire opinion is in footnote 19, wherein Justice Black cites with approval the Eighth Circuit case of United States v. Frank Black Spotted Horse, 282 F. 349 (8th Cir. 1922). In Spotted Horse the Federal District Court of South Dakota held that Todd County "in the absence of an act of Congress opening that country to settlement, and disintegrating the reservation, remarking and changing the reservation boundaries, marking the changes, or abolishing it entirely" (282 F. at 352 [emphasis added]), was still the Rosebud Reservation and all land within it was subject to the jurisdiction of the United States.

Although Justice Black undoubtedly cited the case only for a specific reason,[16] the tenor of the whole decision was that under the then established law,[17] Todd County was the Rosebud Indian Reservation. Gregory, Tripp, Lyman and Mellette County are not even mentioned in the Frank Black Spotted Horse decision.

It would seem to the counties that Frank Black Spotted Horse would be a questionable case at best to cite with approval, if the Supreme Court intended Seymour to be construed in such a manner as to virtually destory the 50 years of South Dakota reservation case law in the Eighth Circuit.

In any event, for the Court to hold in Seymour that the Colville Act was not inconsistent with the continued existence of the reservation boundaries is one thing. The statement appearing in plaintiff's brief at 18 is quite another:

> The Court's decision, presumably made with the above historical circumstances in mind, was that the Colville Act, in opening the surplus and unallotted land on that reservation to non-Indian settlers, did not expressly disestablish or diminish the Colville Reservation, and that, because it had not do [sic] so expressly, it had not done so at all. B.P. at 18 (emphasis as in original).

Not even the recent decisions have gone so far as to cite Seymour for this proposition, let alone state it as the "decision" of the Court. The counties note that although the Seymour opinion did use the word "expressly" in two instances, the first was not even related to plaintiff's statement:

> This Act did not, however, purport to affect the status of the remaining part of the reservation, since known as the "South Half" or the "diminished Colville Indian Reservation," but instead expressly reaffirmed that this South Half was "still reserved by the Government for their "(the Colville Indians') use and occupancy." 368 U.S. at 354.

In the second, Justice Black was merely noting the difference between the 1906 and 1892 Act when he stated:

> Nowhere in the 1906 Act is there to be found any language similar to that in the 1892 Act expressly vacating the South Half of the reservation and restoring that land to the public domain. 368 U.S. at 355.

Had Justice Black thought it necessary to state the holding in a manner even approaching the force of

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[16] The Frank Black Spotted Horse opinion rejected the "checkerboard" concept of criminal jurisdiction within Todd County.

[17] United States v. LaPlant, 200 F. 92 (D.S.D. 1911).

plaintiff's statement, he was certainly capable of doing so.[18]

II. THE RECENT DECISIONS AND PLAINTIFF'S "BUNDLE OF RIGHTS" ARGUMENT

The counties would also submit that none of the recent decisions can be argued to stand for the proposition that this court must disregard the intent of Congress as evidenced by the passage of the three specific acts presented herein. The Rosebud Reservation is a reservation separate and distinct from all other reservations, and each act which this court must construe affected only the Rosebud Reservation.

Secondly, it is the counties' position that this court is the first court to have the opportunity of deciding the issue in its proper historical perspective and in light of the legislative history available--for three very important reasons.

1. Because the Rosebud Reservation was the first reservation to which Congress applied its new policy in the specific form of the 1904 Act, the legislative and historical materials are more detailed than the materials surrounding the later acts which have been construed in the recent decisions.
2. Because the Rosebud Reservation was the target of three separate acts, and these separate acts are all the subject of one declaratory judgment action, this court has the unique opportunity of viewing the acts both retrospectively and prospectively.
3. Because at the time the recent decisions were made, not one of the courts involved was presented with either the legislative and historical origins of this particular form of reservation legislation or the legislative history of the particular act under consideration.[19]

The counties would submit that both Courts in the New Town[20] case, as a direct result of not having any one of these three distinct advantages, found themselves in the very difficult position of having to construe an act of Congress over 50 years old without the aid of legislative or historical material. In this position they could not discern any appreciable difference between the act before them and the one construed in the Seymour case and went with Seymour--and justifiably so. The same situation was presented immediately thereafter in United States ex rel. Condon v. Erickson, 344 F. Supp. 777 (D.S.D., 1972), and State v. Molash, --S.D.--, 199 N.W. 2d 591 (1972), and in view of

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[18] In City of New Town v. United States, 454 F. 2d 121 (8th Cir. 1972), Seymour was cited for the proposition that "the opening of an Indian reservation for settlement by homesteading is not inconsistent with its continued existence as a reservation." 454 F. 2d at 125. Similarly, New Town cited Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), for the proposition that "the purpose to abrogate treaty rights of Indians is not to be lightly imputed to Congress." 454 F. 2d at 126. Early in plaintiff's brief it recognized and cited the rule correctly, but by page 43 it evidently preferred its own version: "the general principal that Indian treaty rights will be abrogated only by unequivocal Congressional language." B.P. at 43. Plaintiff's version of the case itself is set forth at xi, xii:

> The clearest example of this concept [bundle of rights] appears in Menominee Tribe v. United States, supra. When the Menominee Reservation was originally established, the Indians received a bundle of rights, including not only the right to occupy the land but also the right to hunt and fish freely. By the Menominee Indian Termination Act of 1954, 25 U.S.C. Section 891 - 902, the entire Menominee Reservation was disestablished and destroyed. Nevertheless, the United States Supreme Court held that although nothing at all was left of the reservation lands after the termination act, at least one of the original rights in the bundle of rights was not destoryed [sic] by the act. That Court failed to find any Congressional intent to end the tribal rights to hunt and fish as originally granted. B.P. at xi - xii.

The counties would call to the Courts attention the rather atypical situation with which the Supreme Court was presented in Menominee. The ratio decidendi of the case centered around the fact that the termination act, although passed in 1954, did not become fully effective until 1961. In the interim, Public Law 280, also passed in 1954, did become effective and specifically reserved hunting, trapping and fishing rights to the Menominee Tribe. Hence, the Supreme Court held the Termination Act did not destroy those rights. This Court must read the Menominee opinion to fully appreciate the disparity.

[19] This discussion is limited to those decisions discussed in 18 S.D. L. Rev. 85, 122 - 128 (1973).

[20] City of New Town v. United States, Civ. No. 1038 (D.N.D. January 26, 1971); City of New Town v. United States, 454 F. 2d 121 (8th Cir. 1972).

Seymour and New Town, the same result followed. Now, plaintiff is asking this court in view of Seymour, New Town, Condon and Molash to follow through--and his brief would have left this court in the same position.[21]

Irrespective of whether or not the construction of the acts in the New Town, Condon and Molash cases actually conformed with the intent of Congress, this type of case law can only be of questionable value. In the first place, if the decisions are incorrect, the counties are at a distinct disadvantage which did not arise as a result of having the merits of an issue previously decided against them. In the second place, and most importantly, the materials set forth and theories enunicated in the opinions could still be detrimental even in light of the obvious merit of the counties' position. The plaintiff's "bundle of rights" theory is a perfect example (B.P. at x, xi, xii, 42, 43, 50) and one relied upon heavily by the Court of Appeals in New Town.

The cornerstone of this argument is the "nothing in this act shall be construed to deprive the said Indians of the [x] Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provision of this act" provision appearing in all of the homestead acts recently construed. In its polished form the entire argument procedes along these lines:

> Here the 1891 boundaries of the Fort Berthold Reservation were established as a result of Congressional ratification of an 1886 Agreement with the Indians. The right to have the reservation boundaries remain undiminished carries with it many important subsidiary rights, among them the right for unemancipated Indians to be subject only to federal and tribal jurisdiction. The 1910 Act specifically recognized that the opening of the reservation for homesteading was not intended to deprive the Indians of any rights not inconsistent with the Act, and as Seymour establishes, homesteading is not inconsistent with the maintenance of the original reservation boundaries. The 1910 Act clearly by its own terms does not purport to alter the reservation boundaries. City of New Town v. United States, 454 F. 2d at 125 (emphasis added).

This is a truly ingenious argument in that the court does not even have to look at anything other than the "preservation of rights" provision! Indeed, plaintiff even goes so far as to conclude that the "preservation of rights clause in Section 11 [1910 Act] would offer its own basis for finding an undiminished reservation" (B.P. at 51)--irrespective of the fact the 1910 Act on its face referred to the reservation "diminished." But what are the merits of this argument if the Court has an opportunity to look at something beyond the face of the act. In the Rosebud situation it need go no further than the House Report on the 1910 Act: "There will still be left a reservation containing about 1,000,000 acres, and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of." H.R. Rep. No. 429, 61st Cong., 2d Sess. 2 (1910). Certainly this would at least arouse the Court's curiosity as to the validity of plaintiff's position. Perhaps the Court would then look at the debates on the bill and notice the "placing through what were heretofore reservations actual settlers" comment appearing therein. 45 Cong. Rec. 5457 (1910). A Bundle of Rights in a heretofore reservation? At some point the Court would probably conclude that the only reason for the provision in the act was to guarantee a continuation of benefits to the Indians on that part of the reservation that would remain intact, or in other words to guarantee all benefits not inconsistent with the provisions of the act--precisely what the provision stated.

[21] Perhaps in an even more difficult position, for a "little" selected legislative history can be just as dangerous as the proverbial cliche about a "little knowledge."

To arrive at this conclusion one need not have even noticed that the provision appeared word for word in Article V of the original 1901 lump-sum cession agreement which even plaintiff concedes would have diminished the reservation.[22] A "right" to a secure reservation with a fixed boundary in a lump-sum cession agreement to cede part of that reservation would be a tenuous benefit at best and, therefore, the "bundle" argument in effect eventually destroys itself.

Even so, the counties are nevertheless somewhat perplexed at the transition from "benefit" to "right" and completely missed it until recently. It would appear that the court in New Town also missed this transition:

> The 1910 Act specifically recognized that the opening of the reservation for homesteading was not intended to deprive the Indians of any rights not inconsistent with the act. 454 F. 2d at 125 (emphasis added).

The Fort Berthold provision contained "benefits" and the term "rights" does not appear anywhere within the Fort Berthold Act.

Plaintiff makes this same transition, although it uses "rights":

> Preservation of Indian rights
> Of the six acts noted above, all but the Seymour Act contain a crucial clause guaranteeing the preservation of Indian rights . . . . Finally, Section 11 of the Mellette County Act provides that nothing in the Act shall be construed to deprive the Indians of any treaty right unless 'inconsistent with the provision of this act.' B.P. at 41, 50 (emphasis added).,

interchangeably with "benefits" or "prime benefits" throughout its brief. B.P. at 42. The terms "right" or "rights" do not appear anywhere within the text of the entire Mellette County Act. If this clause is such a crucial clause in plaintiff's argument, the counties submit that the terminology chosen by Congress should not be substituted with terminology chosen by plaintiff. Benefits under existing treaties are one thing--rights to a secure reservation are quite another.[23]

III. THE RECENT DECISIONS AND PLAINTIFF'S "AMBIGUITY" RULE

When the Rosebud materials present problems that are somewhat difficult to explain in a manner consistent with plaintiff's argument, these problems are dealt with in one of the three following ways throughout plaintiff's brief. Either:

1. Congress was incompetent, ambivalent or confused and should therefore be excused (B.P. at 29, 30, 31, 45), or
2. The plaintiff's selected legislative and historical materials "dispels the confusion" (B.P. at 31, 46, 48), or
3. At some point, although it is not always clear where, plaintiff's "presumption in favor of the preservation of Indian rights in doubtful cases" or "doubtful expressions are to be resolved in favor of the Indians" rule emerges and saves the day. B.P. at 8, 9, 25, 31, 45, 46, 47, 51.

[22] Article V of the original 1901 lump-sum cession agreement is the Article V of the 1904 Act. Congress enclosed it in quotation marks--i.e. "Article V . . . ." So the 1904 Act states "not inconsistent with this agreement", while the 1907 and 1910 Acts state "not inconsistent with this act." The origin of this provision can be traced into the 1800's.

[23] The only "benefits" mentioned in the Rosebud materials were along the line of rations, cattle, allotments, etc.

As to the first proposition--the counties think that this Court is quite capable of passing on the competency of Congress without any assistance from either the counties or the plaintiff.

As for the second proposition, enough has already been said about the merits of that material.

But the third proposition is an entirely different matter. Initially, it is interesting to note that neither the Seymour nor the recent opinions have even as much as mentioned this so-called rule, much less relied upon it. See Note 19, supra. Indeed, plaintiff even admits this in a round-about way when it states "that the Eighth Circuit Court of Appeals has suggested the first, second, and fourth" of its four principles. B.P. at 4. Nevertheless, plaintiff still maintains that "This court must consider four principles in determining whether the situs of an offense is 'Indian Country' for jurisdictional purposes." B.P. at 4 (emphasis added). The counties would submit that some sort of indicia as to the merits of the third principle in this mandate can be gleaned from the fact that it is rather conspicuously absent in all of the aforementioned opinions.

Secondly, the counties are somewhat confused at what point this court "must" invoke this so-called presumption, principle or rule. If plaintiff is saying that this Court cannot look at the legislative reports and history of the acts if it cannot resolve the issue with certainty from the face of the act; that this Court would at that point have to resolve the entire issue in the Indian's favor--the counties would have to strenuously object. Even plaintiff could not possibly piece together enough material to support such a presumption. The Seymour and recent opinions indicate that those courts at least considered everything that was even presented in the briefs in an attempt to construe the acts consistent with the intent of Congress.[24] In addition, both the majority and dissenting opinions in Menominee, which the counties have already suggested the Court examine for another purpose, (See Note 18, supra), are replete with citations to the Senate and House Documents, and the Congressional Record. The majority opinion even stated that "This construction is in accord with the overall legislative plan" (391 U.S. at 412), and their conclusion:

> buttressed by the remarks of the legislator chiefly responsible for guiding the Termination Act to enactment, Senator Watkins, who stated upon the occasion of the signing of the bill that it 'in no way violates any treaty obligation with this tribe.' 391 U.S. at 413 (emphasis added).

The dissenting opinion stated:

> The statute is plain on its face: after termination the Menominees are fully subject to state law just as other citizens are, and no exception is made for hunting and fishing laws. Nor does the legislative history contain any indication that Congress intended to say anything other than what the unqualified words of the statute express. 391 at 415 (Stewart, J., with whom Justice Black joined, dissenting) (emphasis added).

Again, the Supreme Court does not even mention plaintiff's so-called presumption, principle or rule in favor of the preservation of Indian rights in doubtful cases.

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[24] See, 18 S.D. L. Rev. 85, 122 - 128 (1973). At 127 therein (Note 156) it was stated that at the time of publication the authors were unable to procure the briefs submitted in the Seymour case. The counties have examined these briefs and they do not contain any legislative history of the Colville Act as such, or of the origins of the particular form of homestead act construed therein, although certain House and Senate documents of a later date are discussed in detail and appended in the appellant's brief. In short, the briefs were quite similar to the briefs submitted in the recent decisions.

Even the counties do not really think that plaintiff would actually maintain that this Court must automatically resolve the entire issue in the Indians' favor if the Court does not think it can resolve the issue with certainty from the face of the act. However, because we have not been able to determine with any degree of certainty exactly what plaintiff's position is on this point, we have had to discuss this possibility. For example: "The legislative history dispels the confusion on this point. In addition, this ambivalence renders the above language of the act subject to the rule . . . " B.P. at 31. Exactly when one can or cannot use legislative history or when this ambiguity rule is to be invoked, simply cannot be determined from this or any part of plaintiff's brief.

If there is such a rule that has any applicability to questions of the nature with which this Court has been presented, the counties would submit that it should only be considered after the Court has examined the legislative history and other materials in an attempt to clarify what, if any, doubts the Court might have of resolving the issue from the face of the act. In this respect, the counties have the utmost confidence that the Rosebud materials will more than merely clarify the situation.

Nothing in the foregoing discussion is intended to imply that the counties are denying the existence of some type of rule that permits certain aspects of Indian treaties to be construed in a light most favorable to the Indians. Rather, the counties would urge the court to examine COHEN, HANDBOOK OF INDIAN LAW at 37, 38 and the governments edition, FEDERAL INDIAN LAW, at 147 148,[25] so that the rules stated therein can be viewed in their proper perspective. Then, and only then, can the rather conspicuous absence of such rules in the Seymour and recent opinions, be readily understood. For it is one thing to speak in terms of a "presumption in favor of the preservation of Indian rights in doubtful cases", and it is quite another to state that:

> An accepted rule in the interpretation of Indian treaties is that ambiguities are resolved in favor of the Indians. This rule is qualified by another rule, heretofore noted, that Indian treaties are to be construed according to their tenor and their terms are not to be varied by judicial construction in order to avoid alleged injustices. In other words, while an Indian treaty is to be construed so as to carry out the obligation of the Government in accordance with the fair understanding of the Indians, a court cannot, under the guise of interpretation create authority where none exists or rewrite congressional acts so as to make them mean something they obviously are not intended to mean . . . .
> [T]he courts have indicated that they will not judicially dispense with the conditions or requirements of the treaties upon any notion of equity or general convenience or substantial justice. Justice Harlan, in the case of United States v. Choctaw Nations, said:
>
> > But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with

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[25] Originally published in 1940, FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW was the first modern definitive compilation on the subject. In 1958, the Department of the Interior revised and brought the work up to date in a new publication, FEDERAL INDIAN LAW. Presumably, Mr. Cohen's views were not objective in the original edition (too much in favor of the Indian's position) and the Department of the Interior desired to rectify the situation with its revised edition. Certain individuals were offended and felt the views presented in the revised edition were not objective either (too much against the Indian's position) and the original edition has since been reprinted with a very poignant introduction chastising the Department of the Interior.

Irrespective of the merits of this controversy, the battle is illustrative of the dangers inherent in accepting at face value any of the later source materials, purporting to deal with the intent of Congress in the field of Indian legislation. This point has already been alluded to in Note 1, supra, as the reason the counties have preferred to rely upon the original documents. In addition, the area of Indian jurisdiction and reservation boundaries was not, as Justice Black pointed out in the Seymour opinion, Felix Cohen's forte.

Therefore, the counties are not concerned with the materials in either treatise that might be inconsistent with the position taken in this brief--unless they can be supported in the Congressional materials of the period with which we are concerned. Specific reference is made to much of Mr. Smith's law review article which finds its origins in and builds upon some of the materials and views presented in these works, a position which has been, until recently, systematically rejected by the courts presented with questions about the size of Indian Reservations in North and South Dakota.

> the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the Government. Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the Court of Claims or this court with authority to determine whether the United States had, in its treaty with the Indians, violated the principles of fair dealing. *** FEDERAL INDIAN LAW, ch. 2, at 145, 146 (1958),

and

> A somewhat different, although related, rule of treaty interpretation is to the effect that, since the wording in treaties was designed to be understood by the Indians, who often could not read and were not learned in the technical language, doubtful clauses are resolved in a non technical way as the Indians would have understood the language . . . . Although an interpretation of a treaty should be made in the light of conditions existing when the treaty was executed, as often indicated by its history before and after its making, the exact situation which caused the inclusion of a provision is often difficult to ascertain. New conditions may arise which could not be anticipated by the signatories to a treaty. A practical administrative construction of a treaty which has long been acquiesced in by Congressional inaction is usually followed by the courts. Cohen, HANDBOOK ON FEDERAL INDIAN LAW, ch. 3, Section 2 at 37, 38 (1942) (emphasis added).

Indeed, some of the material presented therein would seem to effectively preclude plaintiff from attempting to attribute a meaning to "diminished" distinct from the sense in which it would "naturally be understood by the Indians." See. B.P. at 46, 48, 50. The complete lack of authority for this point is discussed at 39-40, supra.

IV. THE RECENT DECISIONS AND PLAINTIFF'S "PREPOSITION" ARGUMENT[26]

To fully appreciate the extent of plaintiff's reliance on the "preposition" argument, one need only refer to those sections of its brief wherein this argument is used not only to support the statement that "the three acts repeatedly refer to the Rosebud Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist as such" but also to support the proposition that "at least two presidents have interpreted the three acts not to have diminished the Rosebud Reservation." B.P. at 24, 44, 45 (emphasis as in original). The counties will discuss the different phases of this argument under the following subheadings:

A. THE ACTS

This phase of the preposition argument has its genesis in footnote 11 of the Seymour opinion wherein four sections of the Colville Act were cited for the proposition that the Colville act repeatedly referred to the Colville Reservation "in a manner" that indicated that Congress intended that the Colville Reservation continue to exist as such. 368 U.S. at 355. Justice Black did not specifically refer to any phrase within these sections nor did the opinion explain what was meant by "in a manner." Plaintiff has presumed that the Court was referring to phrases within those sections such as "on said reserva-

[26] The introduction to this argument and its inapplicability to the Gregory County materials is discussed at 20-21, supra. The material therein should be read in conjunction with the material set forth in this section.

tion" and has therefore extracted similar phrases from each and every section of the three acts. Although the counties cannot determine precisely what Justice Black meant, perhaps he thought the sections in some way referred to the continuing existence of a reservation which the state was maintaining would no longer exist at all.

In any event, the counties fail to see how the references cited by plaintiff support the proposition that "the three acts repeatedly refer to the Rosebud Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist as such." B.P. at 45 (emphasis as in original). For example, plaintiff cites "of the said Rosebud Reservation" from Section 2 of the Mellette County Act. B.P. at 44. That section states in part:

> Provided, That prior to said proclamation the allotments within the portion of the said Rosebud Reservation to be disposed of as prescribed herein shall have been completed . . . . Act, supra, Section 2.

The counties would submit that this, or any other reference to the countinuing existence of the Rosebud Reservation in the three acts, is not probative of the issue to be decided in this case for the simple reason that the counties are not, as was the case in Seymour, maintaining that the entire reservation would cease to exist.

Not one word of explanation of plaintiff's rationale appears in its brief other than: "Therefore, since the United States Supreme Court cites the above language of the Seymour Act in support of the proposition that . . . then the nearly identical language in the three acts must support with equal force that . . . ." B.P. at 45 (emphasis added). Why? Unless the mere fact that the Colville Act contained the phrase "of the said reservation" and the Mellette County Act also contains the phrase "of the said reservation" is supposed to be probative of something, the counties sincerely fail to see how this in any way supports the proposition that the acts "repeatedly refer to the Rosebud Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist as such." B.P. at 45.[27]

Evidently the courts in the recent cases of New Town, Molash and Condon have not considered similar phrases appearing in those acts probative of the diminution issue either. None of the opinions even mentions them.

B. THE PROCLAMATIONS

Nor can the counties agree that the Presidential Proclamations indicate "at least two Presidents have interpreted the three acts not to have diminished the Rosebud Reservation." B.P. at 24 (emphasis added).

1. 1904 Proclamation--Although plaintiff actually concedes that from the language therein "one might infer that Roosevelt did contemplate a diminished Rosebud Reservation" (B.P. at 25), its statement remains "two presidents have interpreted the three acts not to have diminished the Rosebud Reservation." B.P. at 24 (emphasis added). How plaintiff eventually arrived back at the three act

[27] The Gregory County Act propositions do not even have this dubious distinction for they, as stated at 20-21, supra are all from Article IV of the 1904 Act, which is the Article IV of the original 1901 lump-sum cession agreement.

figure is illustrative of the rather tenuous nature of many of plaintiff's arguments. In essense it states: that Roosevelt nearly duplicated the language Congress used in the 1904 Act; that the 1904 Act is ambiguous and is subject to its "ambiguity" rule; and that therefore President Roosevelt's 1904 Proclamation should be equally subject to this rule. Hence, from two acts back to three acts! B.P. at 25. The counties would submit that the use of this type of analysis to support a statement that the 1904 Proclamation indicates President Roosevelt interpreted the 1904 Act not to have diminished the Rosebud Reservation is, at best, questionable.

2. 1907 Proclamation--The only support for plaintiff's statement in this instance is the "of" in the first paragraph of the 1907 Proclamation:

> Whereas by the Act approved March 2, 1907 (34 Stat., 1230), the Congress directed that all that part of the Rosebud Indian Reservation lying south of the Big White river, and east of Range 25 west, of the Sixth Principal Meridian, except all Sections 16 and 36, which were granted to the state of South Dakota, and excepting also such parts thereof as have been or shall hereafter be either allotted to Indians, selected by said state, or reserved for townsite purposes, be disposed of under the general provisions of the homestead laws of the United States, and be opened to settlement, entry and occupation only in such manner as the President might prescribe by proclamation;
>
> Now, therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power and authority vested in me by said Act of Congress, do hereby prescribe, proclaim and make known . . . . Act of August 24, 1908, 35 Stat. 2203 (emphasis added).

In the first place, the counties would submit that a singular unexplained "of" hardly supports an unequivocal statement that the Proclamation indicated that President Roosevelt interpreted the 1907 Act not to have diminished the Rosebud Reservation--and this "of" is not even of that status (i.e. unexplained). The source of the "of", as well as most of the entire paragraph, is exactly where plaintiff surmised President Roosevelt extracted his bad 1904 Proclamation language from: the act itself.

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of all that portion of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of range twenty five west of the sixth principal meridian, except such portions thereof as have been, or may hereafter be, allotted to Indians:
> Provided, That sections sixteen and thirty-six of the lands in each township shall not be disposed of, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose.
>
> Sec. 2. That the land shall be disposed of by proclamation, under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President . . . . Act of March 2, 1907, 34 Stat. 1230 (emphasis added).

Until the counties noticed plaintiff's explanation of the source of the phraseology in the 1904 Proclamation, they were admittedly somewhat concerned, not so much with the 1907 Proclamation,[28] as with the 1910 Proclamation. The explanation that the acts, which would of course refer to land to be disposed of as "within" or "a part of" the Rosebud Reservation, were the source of the phraseology appearing in the Proclamations, was indeed welcome.

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[28] The relation between the "preposition" argument and the "open" terminology is discussed at 54-55, infra.

3. 1910 Proclamation--Again, the only support for plaintiff's statement is a singular preposition, in this instance "within", appearing in the 1910 Proclamation:

> I, WILLIAM H. TAFT, President of the United States of America, by virtue of the power and authority vested in me by the Acts of Congress approved May 27, 1910 (36 Stat. 440), and May 30, 1910 (36 Stat., 448), do hereby prescribe, proclaim and make known that all the non-mineral, unallotted, unreserved lands within the Pine Ridge and Rosebud Reservations in the State of South Dakota, which have been classified under said Acts of Congress into agricultural land of the first class, agricultural land of the second class, and grazing land shall be disposed of under the general provisions of the homestead laws of the United States and of said Acts of Congress, and be opened to settlement and entry, and be settled upon, occupied and entered in the following manner, and not otherwise: . . . Act of June 29, 1911, 37 Stat. 1691 . . . (emphasis added).

As in the 1907 Act, the counties would submit that this singular "within" hardly supports an unequivocal statement that the Proclamation indicated President Roosevelt interpreted the 1907 Act not to have diminished the Rosebud Reservation. Although the precise source of the "within" cannot be fixed as conclusively as was the "of" in the 1907 Proclamation, perhaps because of the dual nature of this particular proclamation, the 1910 Act does contain a number of "withins". In any event, this whole process of building upon a singular preposition in a proclamation to support the statement that the proclamation indicated that the President interpreted the act not to have diminished the reservation; and from there to the main title that "Those chiefly responsible for the administration of the three acts do not regard the three acts as having diminished the Rosebud Reservation", is illustrative of the quantity and quality of the material upon which plaintiff relies and upon which the courts recently construing other homestead acts have had to rely. B.P. at 24.[29]

C. THE LATER MATERIALS

But for this reliance, as evidenced by footnotes 8 and 9 in the New Town opinion (454 F.2d at 125,126), the counties would not have indulged in picking these materials apart in an attempt to explain each and every preposition. Indeed, if we had to rely solely on this process and thereby necessarily disregard the tenor of the whole transaction, we would eventually come to a situation like that on page 1853 of the Congressional Record where the following title and remarks appear:

> Extension of time to Homestead Settlers on Rosebud Reservation, S. Dak., etc.
>
> Mr. MARSHALL. Mr. Speaker, I ask unanimous consent for the present consideration of the bill which I send to the desk.
> The SPEAKER. The gentleman asks unanimous consent for the present consideration of the bill the title of which the Clerk will report.
> The Clerk read as follows:
> A bill (s. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation with the limits of Gregory County, S. Dak . . .

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[29] The only other material plaintiff could muster to support this statement was (1) the mere fact that in 1934 the Secretary of the Interior approved the Tribes constitution--"The Secretary of the Interior has interpreted the three acts as not having diminished the Rosebud Reservation" (B.P. at 25, 26) and (2) that in 1972, the Field Solicitor of the Bureau of Indian Affairs, Aberdeen, South Dakota, issued a memorandum consonant with plaintiff's views (B.P. at 26, 27). Hence, "Those chiefly responsible for the administration of the three acts do not regard the three acts as having diminished the Rosebud Reservation" (B.P. at 24). The counties would submit that these are not exactly the type of administrative interpretations that are entitled to great weight, to say the least. The Department of the Interior's position in this respect is made quite clear in the documents written before and immediately after the passage of the three acts. See 11-12, 14, 19-20, 23, 24, 25, 28-32, 34-35, 36, 37-38, 40-42, 56, supra and infra.

> Mr. UNDERWOOD. Mr. Speaker, reserving the right to object, I would like to ask the gentleman as to whether this bill increases the size of the homestead?
> Mr. MARSHALL. No, sir; it does not. This bill simply gives to the settlers on the . . . Rosebud Reservations, which were opened by proclamation last fall, an extension of time of about sixty days, until May 1, to move on their lands and make improvements.
> Mr. UNDERWOOD. It does not increase the size of the homestead?
> Mr. MARSHALL. Not the slightest . . . . 39 Cong. Rec. 1853 (1905) (emphasis added).

The counties would then be at a loss for an exact explanation as such for Congressman Marshall's indiscriminate use of the preposition "on" and hence doomed to defeat. However, in light of the plain language of this statute, the House Report, the Senate Report, the title and remarks of Senator Gamble in the Congressional Record, and the information in the Interior documents,[30] the counties would still submit that, in its entirety, the judiciary could not expect a more relevant, consistent, clear, immediate, and unequivocal congressional confirmation that the 1905 "extension" statute and peripheral materials concerned therewith.[31]

The counties would also submit, that to view such prepositions in any other manner, and then either raise them to the status of an ambiguity and resolve the entire issue contrary to counties' position, or even worse, consider such prepositions as evidence of a congressional intent present in 1904 not to diminish the reservation, would be to completely nullify that effect which Congress considered an almost obvious corollary of the act itself.

The final aspect of the preposition argument remaining to be discussed is its use in conjunction with "opened" reservation terminology. At 13-14, supra, the counties have already discussed the fallacious nature of the mystical equation of this terminology with the trustee-homestead provision which supposedly "opened" a reservation without diminishing the size or boundary of that reservation. The combination of the two are illustrated in the following hypothetical 1905 statute:

> Chap. 178. An Act for the sale of isolated tracts in the former Rosebud Reservation.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the provisions of Section 1000 of the Revised Statutes of the United States as amended by the Act of May 31, 1904, relating to the sale at public auction of isolated tracts of the public domain, be, and the same are hereby extended and made applicable to lands within the portion of the Rosebud Indian Reservation, South Dakota, opened under the Act of April 23, 1904 . . . (emphasis added).

It is to be noted that the last part of the statute does not say "to lands [now] within the portion of the Rosebud Indian Reservation, South Dakota, opened under the Act of April 23, 1904" nor does it say "to lands [formerly] within the portion of the Rosebud Indian Reservation, South Dakota, opened under the Act of April 23, 1904." In fact, the counties would submit that the sentence is merely a

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[30] These materials are set forth at 18-19, supra.

[31] The counties would call to the court's attention the manner in which the subheadings in the Congressional Record correspond to the remarks of the Senators and Representatives. In this instance, Marshall refers to settlers on the Rosebud and the subheading in the Congressional Record refers to settlers on the Rosebud. Senator Gamble, however, more explicity refers to the extension of time which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation and the title in the Congressional Record merely states "Extension of time to Homestead Settlers." See 18-19, supra.

statement of the issue to be decided, i.e. whether the lands within the portion of the reservation, opened under the Act of April 23, 1904, are now within the reservation. In this context the "within" is meaningless and to equate "opened" with either diminished or non-diminished would be a classical example of begging the question. If this is so, how can the "within" in the body of the statute be said to be inconsistent with the "former" in the title and thereby render the statute inconsistent within itself?

Yet, this is precisely the case in footnote 9 of the New Town opinion, wherein the following example was cited for the proposition that the "later" statutes are "not always consistent, even within themselves":

> 9. For example, the Act of May 10, 1920, 41 Stat. 595, was entitled "An Act for the sale of isolated tracts in the former Fort Berthold Indian Reservation, North Dakota (emphasis added). However, the body of the statute referred to "lands within the portion of the Fort Berthold Indian Reservation, North Dakota, opened under the Act of June 1, 1910" (emphasis added). These lands were located through areas A and B. 454 F. 2d at 125, 126 (emphasis as in original).

The Rosebud hypothetical is of precisely the same text as the statute cited by the Court of Appeals. The only reason for its inclusion in this brief is to point out how the preposition argument in combination with the "opened" terminology, could lead one to find inconsistencies where none exist and thereby disregard whatever probative value a latter statute referring to a "former" reservation might have.

As to the later statutes which are truly inconsistent within themselves or, for that matter, any later reference where the lands in question are still being referred to as "within" or "on" or "in" the reservation, the counties would submit that this is a direct result of the titles and sections of the original acts themselves, referring to the lands in this manner. For example, the 1907 Act entitled "Act to open to settlement surplus or unallotted lands in the Rosebud Indian Reservation" (emphasis added) or the 1910 Act entitled "Act to authorize the sale and disposition of a portion of the surplus and unallotted lands in Mellette and Washabaugh counties in the Rosebud Indian Reservation." The other prepositions are scattered at random throughout the entire text of the three acts.

For any person drafting legislation or commenting upon the original act to refer to the phrases appearing in the original act, would certainly seem to be just as plausible as the alternative: That the entire Congress and just about everybody else concerned was so incompetent that they could not refer to a piece of legislation or draft a two-sentence bill concerned therewith without the same being either "internally inconsistent" or inconsistent with other similar legislation or remarks they had made the previous day.

V. THE STATUS OF THE OPENED ROSEBUD LANDS

There are two related aspects of plaintiff's position on this issue which merit some extended discussion.

A. INDIAN TITLE

Using the somewhat questionable phrase "Indian title" to describe a beneficial interest which it

maintains the Indians retained in the opened lands until they were disposed of, plaintiff states that "surely the prospect of lingering Indian title is incompatible with the notion of a diminished reservation." B.P. at 40. Along these same lines at 47 it reiterates:

> These surplus lands and unallotted lands in Mellette County did not become part of the public domain because the Rosebud Sioux retained an equitable interest in those lands until and unless the entryman perfected his entry. B.P. at 47.

The case of Ash Sheep Co. v. United States, 252 U.S. 159 (1920), cited by plaintiff that "made this distinction clear" (B.P. at 47) was not concerned with the Rosebud Reservation or even the issue with which this court is presented. The case itself has not been cited in or relied upon by either Seymour or the recent decisions. Nevertheless, plaintiff still maintains the Rosebud Sioux retained an equitable interest in these opened lands.

It is the counties' position that Congress intended the three acts to extinguish all "Indian title" to the extent that the only interest that remained was the right, as provided in the act, to the proceeds as the lands were disposed of. The 1912 Report of the Commissioner of Indian Affairs not only conclusively supports this position, but also reveals the source of some of the confusion in this particular area:

> Under various acts passed by Congress within recent years certain lands ceded by the Indians to the United States are open to settlement and entry, and the Government endeavors to dispose of them at their appraised value for the benefit of the Indians.
>
> Nearly all of such acts contain a clause practically identical with the following:
>
> That nothing in this act shall in any manner bind the United States to purchase any portion of the lands herein described, * * * or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided.
>
> It has been the practice to consider such lands under the jurisdiction and supervision of the General Land Office from the passage of the act, and the Indians' title thereto extinguished. On this theory the public at large has come to consider said lands a part of the public domain, and the lands have therefore been used indiscriminately by various interests, principally for grazing purposes, without compensation to the Indians.
>
> By departmental decision of November 27, 1911, it was held in effect that the Indians' title to such lands is not extinguished until date of entry, settlement, or sale, and the Indians are entitled to their use, or to any revenue that may be derived from their use by others, pending date of settlement, sale, or entry. Report of the Commissioner of Indian Affairs, 51 (1912).

As the report indicated, until 1912 it had been the practice to consider the Indians' title extinguished from the date the act was passed. In this respect the lands were considered a part of the public domain and therefore under the jurisdiction and supervision of the General Land Office. By departmental decision of November 27, 1911, however, the department, not Congress, decided to affect a procedural change in order to compensate the Indians for the use of the lands pending date of settlement, sale or entry.

In the first place, it should be noted that the effect of the three acts on the status of the land (the extinguishment of Indian title) remained unaffected by this departmental policy, as the acts themselves were in essence the final word from Congress on this point. Also, an examination of the Rosebud

materials presented elsewhere in this brief shows that time and time again, the members of Congress, the Department of the Interior, and the Commissioner of Indian Affairs, all attributed this extinguishing effect to the three Rosebud acts.

Secondly, the prospect of a lingering "Indian title" of the nature referred to in the above report, and which lasted only until the lands were disposed of, would not necessarily be inconsistent with the notion of diminished reservation.

B. PUBLIC DOMAIN

Throughout plaintiff's brief various other indirect and direct references are made to the concept of public domain. At one point, plaintiff notes that "Congress is certainly capable of making its intent clear to disestablish a reservation and restore it to the public domain." B.P. at 43. Later on the same page, plaintiff again refers to "the demonstrated capacity of Congress to use unequivocal language to disestablish a reservation and restore it to the public domain." B.P. at 43. These and other similar references could lead one to think that the only manner in which Congress was capable of disestablishing any portion of a reservation was by the process of technically restoring the lands therein to the public domain. Although the Rosebud materials do contain many references to the three acts restoring the opened lands to the public domain, the counties do not necessarily agree that this is the only manner in which Congress could extinguish or diminish a reservation.

Specifically, the counties have in mind and deem significant a statement by Judge Blackmun, now Justice Blackmun of the United States Supreme Court, appearing in the opinion of Beardslee v. United States, 387 F. 2d 280 (8th Cir. 1967),[32] an Eighth Circuit Court of Appeals case decided after the Seymour decision. Justice Blackmun therein referred to the absence of Federal jurisdiction on non-Indian land "on a disestablished portion of a reservation, however that disestablishment may have been affected." 387 F 2d at 286 (emphasis added).

In other words, it is the counties' position that merely because the earlier cessions referred to a restoration of lands to the public domain and such cessions have since been held to have extinguished or diminished reservations, it should not be automatically assumed that unless a specific act or the legislative history thereof indicated an intent to technically restore lands to the public domain, there could be no intent to extinguish or diminish that reservation.

Admittedly, the concept of the public domain is an excellent indicia of congressional intent, but it should not be deemed the sole process by which Congress can or has disestablished or diminished reservations.

VI. INDIAN COUNTRY: 18 U.S.C. Section 1151

Many of the older decisions of the Eighth Circuit have been highly regarded in the field of Indian Law. This esteem has not only been recognized by judicial bodies in other states and the United States

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[32] Discussed at 58-59, infra.

Supreme Court, but also by Congress. With specific reference to the effect of the homestead acts on the size of reservations in South Dakota, the case of United States v. LaPlant, 200 F. 92 (D.S.D. 1911), wherein Judge Willard stated that "No other meaning can be given to the words italicized ["thus diminished"] than that the reservations were diminished, and they were diminished by the act itself" (200 F. at 94), has been the cornerstone of this area of the law in this state for many years. Although the LaPlant case itself never achieved national prominence, it was cited with approval in other cases that definitely did. One such example was when the Eighth Circuit Court of Appeals decided Kills Plenty v. United States, 133 F. 2d 292 (8th Cir. 1943):

> In 1911, it was ruled in the case of United States v. LaPlant, D.C.S.D., 200 F. 92, that the federal court was without jurisdiction of the crime of murder committed on lands which were originally within the boundaries of the Cheyenne River Indian reservation but were excluded from the reservation by the Act of May 29, 1908, Chap. 218, 35 Stat. 460, diminishing the reservation. 133 F. 2d at 294.

The question in Kills Plenty was essentially the same question presented in Frank Black Spotted Horse, supra, and it was resolved in the same manner. Although both cases were concerned only with checkerboard jurisdiction in Todd County, neither case even mentioned Gregory, Tripp, Lyman or Mellette County. Indeed, no one could have read Kills Plenty without concluding that Todd County was the only county considered to be within the boundaries of the Rosebud Indian Reservation at that time. Certiorari was later denied and when 18 U.S.C. 1151 was revised in 1948, Kills Plenty was cited therein as one of the cases on which the 1151(a) definition of Indian Country was based. Revisor's note preceding 18 U.S.C. Section 1151 (1949). See also H.R. Rep. No. 304, 80th Cong. 1st Sess. A 92 (1947). Therefore, at the time Congress defined Indian Country as "all land within the limits of any Indian reservation" (1151[a]) and based that definition in part on the Kills Plenty case, at least the revisors realized that Todd County was the only county considered to be within the Rosebud Indian Reservation. By enacting 1151(a) and to this extent, Congress had eliminated the impractical pattern of checkerboard jurisdiction in the only area of the Rosebud Indian Reservation they though existed![33]

But even in 1948, Congress realized that 1151 (a) would not encompass all Indian allotments and so 1151(c) was set forth as an addition to the definition of Indian Country:

> All Indian allotments, the Indian titles to which have not been extinguished including rights of way running through the same. 18 U.S.C. Section 1151(c) (1949).

The counties would submit, and as recently as 1967 the Eighth Circuit Court of Appeals has so indicated, that this is the only section of 18 U.S.C. 1151 that has been or was intended to apply to Gregory, Tripp, Lyman and Mellette counties. Beardslee v. United States, 387 F. 2d 280 (8th Cir. 1967).

Beardslee involved essentially the same issue that had been presented in Kills Plenty and Frank Black Spotted Horse and the same result followed. In two other respects, however, the case is very interesting. In the first place, it was decided after the Seymour decision and specifically mentioned

[33] Other sections of the Revisor's note and H.R. Rep. No. 304, supra, also indicate that the men responsible for drafting Section 1151-1154 were very much aware of what were then the reservations in South Dakota. One can only imagine how these men, after reading Kills Plenty, would have enacted had the Eighth Circuit Court of Appeals in 1950, held that Gregory, Tripp, Lyman and Mellette counties were suddenly within the limits of the Rosebud Indian Reservation.

Gregory, Tripp, Lyman and Mellette counties in a manner inconsistent with plaintiff's position:

> 1. The Rosebud Reservation was established by, and is described in, Section 2 of the Act of March 2, 1889, 25 Stat. 888. The boundaries of Todd County, in which the town of Mission is located, are laid down in S.D. Code, Section 12.0162 (1939). All of Todd County is obviously within the original boundaries of the Rosebud Reservation. Only three Acts of Congress have affected the territory of the reservation since its establishment in 1889 and none of these concern Todd County. Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448. No part of the Todd County portion of the reservation has ever been formally opened. Instead, that portion has remained closed since 1889. The general geographical situation is thus clear. 387 F. 2d at 285 (emphasis added).

More importantly, the opinion referred to "a disestablished portion of the reservation, however that disestablishment may have been effected" (387 F.2d at 286), and specifically stated that:

> We regard clause (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent." Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. 387 F. 2d at 287 (emphasis added).[34]

As far as the counties have been able to determine, Frank Black Spotted Horse, Kills Plenty, and Beardslee are the only cases wherein the Eighth Circuit has been presented with a question involving Indian jurisdiction on the Rosebud Reservation. In all three, one cannot read the Court's opinion without concluding that Gregory, Tripp, Lyman and Mellette counties were simply not considered to be within the limits of the Rosebud Indian Reservation.

Secondly, irrespective of how the general issue before this Court is ultimately resolved, there is no question that the court in Beardslee correctly interpreted 1151(c) as applying only to non-reservation situations. To this extent, 1151(c) specifically approved checkerboard jurisdiction. The Revisor's note and the House Report stated that "Indian allotments were included in the definition on authority of the case of United States v. Pelican". The Pelican case specifically held that after a reservation had in fact been diminished, the allotments outside the boundaries of that reservation were still Indian country and would remain Indian Country until Indian title had been extinguished.[35] Yet, in the Seymour opinion the following statement appears:

> For that argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of Section 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought

[34] Most of the cases cited by plaintiff in its brief at 22, 23, were specifically cited with approval in the Beardslee opinion. Indeed, Judge Blackmun, now Justice Blackmun of the United States Supreme Court, who authored the Beardslee opinion, even cited LaPlant approvingly. 387 F. 2d at 286.

[35] 232 U.S. 442 (1913). Revisor's note preceding 18 U.S.C. Section 1151 (1949). See also, H.R. Rep. No. 304, 80th Cong., 1st Sess. A 92-94. (1947).

to avoid. 368 U.S. at 358 (emphasis added).

Although Justice Black was concerned only with the rejection of checkerboard jurisdiction within the boundaries of a reservation, as the italicized portion of his statement indicates, the paragraph is still confusing in this respect: Federal jurisdiction does not depend solely upon the existence or non-existence of a reservation. In the situation described in 1151(c), law enforcement officers will still have to "search tract books" and to this extent the "impractical pattern of checkerboard jurisdiction" has not been "avoided by the plain language of Section 1151."

In Gregory, Tripp, Lyman and Mellette counties, the law enforcement officers have searched the tract books for years. Until Congress decides otherwise, the counties would prefer to remain "non-reservation lands" irrespective of the temporary inconvenience of the impractical pattern of checkerboard jurisdiction as set forth in 1151(c). This is especially so in light of the alternative: that of being thrust within the boundaries of a reservation which the counties have not been within for over 50 years.

CONCLUSION

In plaintiff's words:

> This action seeks declaratory judgment as to the effect of these acts, 1904, 1907, 1910, on the size of the reservation. In truth, the action asks the Court to define for the parties the present boundaries of the Rosebud Indian Reservation. A.P. at 2.

The first part of this brief contains unequivocal probative evidence of the precise effect Congress intended these acts to have on the size of the reservation; the second part contains an evaluation of the applicable case law and plaintiff's sophisticated arguments.

The counties have submitted that the applicable case law should not be construed as a mandate for this court to disregard the effect, as evidenced by the materials in part one, that Congress intended the three acts to have on the size of the Rosebud Indian Reservation. Similarly, the material in part one was also relied upon to dispose of plaintiff's bundle of benefits, presumptions, prepositions and ambiguities; a most sophisticated argument to be sure, but not to the degree that it could weather a full exposure to the Rosebud documents.

Admittedly, the method used by Congress to open the Rosebud Reservation was different from the method used by Congress in the 1800's. Nevertheless, with respect to the Rosebud Reservation, the concept of a reservation diminished remained the same and this concept permeates the Rosebud documents of the period. Plaintiff has not nor cannot produce sufficient material from any Rosebud source prior to 1911 to clearly support its position that Congress did not intend to diminish the Rosebud Reservation by the passage of the three acts. In the absence of such support to counter the intent expressed in the documents presented herein, the counties would submit that just as there was no occasion to continue a reservation larger than Todd County in 1910, there is no occasion to enlarge that reservation today.

Andrew W. Bogue
U. S. District Judge
Rapid City, South Dakota 57701

United States District Court
District of South Dakota

P. O. Box 207.
Rapid City, South Dakota
February 6, 1974

Mr. Richard A. Smith
Mr. Mark V. Meierhenry
Legal Services
P. O. Box 227
Rosebud, South Dakota 57570

Mr. C. J. Kelly
Assistant Attorney General
State of South Dakota
Pierre, South Dakota 57501

Mr. William F. Day, Jr.
Attorney at Law
P. O. Box 600
Winner, South Dakota 57580

Re: Rosebud Sioux Tribe v. Hon. Richard Kneip, Governor of the State of South Dakota, et al. - CIV72-3015

Gentlemen: MEMORANDUM OPINION

The Rosebud Sioux Tribe has brought this declaratory judgment action pursuant to 28 U.S.C. §2201 et seq. seeking declarations that three specific acts of Congress did not diminish the Rosebud Sioux Reservation or alter its boundaries from those defined in the act of March 2, 1889. The defendants, the State of South Dakota and the counties of Mellette, Todd, Tripp and Gregory, assert that the three acts did diminish the Rosebud Reservation so that that reservation presently embraces

only Todd County, South Dakota. Acting on this assertion, the defendants have been exercising both civil and criminal jurisdiction over members of the Rosebud Sioux Tribe within the counties of Mellette, Lyman, Tripp and Gregory. The plaintiff does not seek a declaration of the exact nature of the jurisdiction, or the exact rights and privileges that members of the Rosebud Sioux Tribe enjoy in the four counties in question. The plaintiffs do ask this Court to declare whether or not any of the three statutes in question operated to diminish the geographical territory over which the tribe is entitled to exercise jurisdiction.

In recent years there have been many cases with substantially similar questions presented to the state and federal courts. See, Conway v. Superintendent, 368 U.S. 351; 82 S.Ct. 424 (1962); Rosebud v. Arnett, 93 S.Ct. 2265 (1973); City of New York, U. S. v. United States, 454 F.2d 121 (8th Cir. 1972); United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973); United States ex rel. John Feather v. Erickson, (8th Cir., filed Dec. 7, 1973, No. 73-1453 to 73-1459); State of South Dakota v. Holeeh, 199 N.W. 2d 591 (S.D. 1972); State of South Dakota v. Williamson, 211 N.W. 2d 182 (S.D. 1973). It is conceded that a declaratory

judgment is an appropriate remedy in this circumstance.

PRELIMINARY STATEMENT

In 1868 the United States and the Great Sioux Nation agreed upon the establishment of the Great Sioux Indian Reservation. This treaty was ratified by Congress on February 16, 1869, (15 Stat. 635), and proclaimed by President Andrew Johnson on February 24, 1869. This reservation, as formed by the 1868 Treaty, encompassed all the present state of South Dakota west of the eastern bank of the Missouri River, including the four counties in question. However, the Great Sioux Reservation, as originally established, was diminished by a series of acts. An Act of March 2, 1889, (25 Stat. 888) reduced the Sioux lands to about half their former extent and explicitly restored the remainder to the public domain. This is conceded by the Tribe. In that act, the Rosebud Sioux Reservation was established and contained the counties of Mellette, Tripp, Todd and part of Gregory and Lyman. The statutory description of the Rosebud Reservation was as follows:

> "Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle

> of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel to a point due south from the mouth of Black Pipe Creek; thence due north to the mouth of Black Pipe Creek; thence down White River to a point intersecting the west line of Gregory County extended north, thence south on said extended west line of Gregory County to the intersection of the south line of Brule County extended west; thence due east on said south line of Brule County extended to the point of beginning in the Missouri River, including entirely within said reservation all islands, if any, in said river."

In United States v. Celestine, 215 U.S. 278, 30 S.Ct. 93, 95 (1909) the Supreme Court of the United States said:

> "When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."

The United States Eighth Circuit Court of Appeals has just recently set forth clear guidelines for district courts in determining jurisdictional questions relating to Indian reservations. The Court said in United States, ex rel. Feather, et al. v. Erickson, supra, the following:

> "We have these guidelines: (1) Intent to abrogate treaty rights is not lightly

> imputed to Congress. Minnesota Tribe of Indians v. U. S., 391 U.S. 404, 413 (1968); (2) Congress having once established a reservation, all tracts remain a part of that reservation until separated therefrom by Congress. U. S. v. Celestine, 215 U.S. 278, 285 (1909); Seymour v. Superintendent, 368 U.S. 351, 359 (1962). Indeed, Congressional intent to disestablish the reservation must be either expressed on the face of the Act or be clearly discernible from the 'surrounding circumstances and legislative history.' Mattz v. Arnett, ___U.S. ___, 93 S.Ct. 2245, 2253 (1973); United States ex rel. Condon v. Erickson, 478 F.2d 684, 689 (CA8 1973); (3) Opening an Indian reservation for settlement by homesteading is not necessarily inconsistent with its continued existence as a reservation. Seymour, supra. See also, Condon, supra; The City of New Town, North Dakota v. United States, 454 F.2d 121, 125 (CA8 1972); (4) The well-preserved general rule is that Indians are to be left free from state jurisdiction and control. McClanahan v. State Tax Commissioner of Arizona, ___U.S. ___, 93 S.Ct. 1257 (1973); Condon, supra at 689 and citations. Federal jurisdiction is preferred. McClanahan, supra. (Slip opinion p.p. 6-7)

Certainly in construing treaties and statutes passed for the benefit of Indians and Indian tribes, courts must construe them liberally and wherever possible resolve any doubt in favor of the same. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Carpenter v. Shaw, 280 U.S. 363 (1930); Choate v. Trapp, 224 U.S. 665 (1912); Alaska Pacific Fisheries v. United States,

248 U.S. 78 (1918).

In regard to the three acts in question, it becomes the duty of this Court to examine those acts in relation to the guidelines set forth above to determine whether or not the Congress of the United States, in passing those acts, intended to diminish and extinguish the portions of the reservation covered in those acts, or merely to open those portions of the reservation to homesteading, and to not affect the outer confines of the Rosebud Reservation thereby. The acts in question are as follows: April 23, 1904 (33 Stat. 254); March 2, 1907 (34 Stat. 1230); May 30, 1910 (36 Stat. 448). The issue has been extensively and excellently briefed by both sides. In addition, this very issue has been discussed at length in two law review articles. See, Comment, Now Town, et al: The Future of an Illusion, 18 S.D. Law Rev. 85 (1973); Smith, Now Town, et al: A Reply, 18 S.D. Law Rev. 327 (1973). This Court will consider the acts in the order of passage.

1904 ACT
(Gregory County)

The operative language of the 1904 Act reads as follows:

"Article I. The said Indians belonging

> on the Rosebud Reservation, South Dakota, for the consideration herein named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows:..."

The 1904 Act originated in 1901. When the Rosebud Reservation was created by Congressional Act in 1889, §12 of that Act read as follows:

> "Section 12 - That at any time after lands have been allotted to all the Indians of any tribe as herein provided for, or sooner, if in the opinion of the President, it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with any Indian tribe for the purchase and release by said tribe in conformity with the treaty or statute under which said reservation is held of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell on such terms and conditions as shall be considered just and equitable between the United States and said tribes or Indians, which purchase shall not be complete until ratified by Congress:..." Act of March 2, 1889, §12 (25 Stat. 888).

Pursuant to Section 12, an agreement was reached with the Rosebud Sioux Tribe in 1901 to cede the surplus, unallotted portion of the Reservation lying in Gregory County to the

> that the intention of the Act is that the United States shall act as trustee for the Indians in disposing of the lands and pay over the proceeds from the sale therefore only as the same are received." H.R. 10418, 58th Cong., 2nd Sess., January 21, 1904, p. 2.

The plaintiff states in its brief:

> "thus, it is clear that, although the Gregory County act does employ some language to the effect that the United States was purchasing a tract of land outright for a consideration with the tribe retaining no interest, this was not the case. Congress actually had just abandoned this policy in favor of a policy whereby the United States acted merely as trustee for the sale of lands for the Indians, with the proceeds of the lands being paid to the tribe only if and when actually received from the homesteaders, instead of the United States paying the Indians a lump sum immediately and then trying to find buyers to recover the purchase price. As Burke stated, the Gregory County Act would establish a new policy, the refinements of which had yet to be made." Plaintiff's brief, (hereinafter cited as PB), at p. 30.

It is, however, the defendant's position that this "new policy" related solely and only to the method of payment and that the purpose and effect of the 1904 Act was the same as the 1889 Act in that regard. That is, that the opening of that portion of the reservation worked a diminution of the

United States. However, the 1901 agreement itself was never ratified by Congress. The portion of Gregory County opened to non-Indian settlers was not approved by Congress until 1904. It is the plaintiffs' contention that this delay marked a departure point--a point at which the whole tenor of congressional reservation policy changed. It appears that the plaintiff concedes that the 1901 agreement would have worked a diminution of the reservation. The plaintiff quotes the following House Report in support of this contention:

> "Both of those bills present a new idea in acquiring Indian lands, and if this bill should be enacted into law it will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians and pay them therefor and then open the same to entry and settlement... This bill provides that the land shall be disposed of under the homestead laws by the settler paying therefor, and the proceeds paid to the Indians, and it is expressly provided by Section * of this bill that the United States shall in no manner be bound to purchase any portion of the land except the school sections, or dispose of the same except as provided, or to guarantee to find purchasers for said lands, it is expressly stated

outer confines of the reservation and extinguished the same, making the reservation smaller than it originally was.

The Congressional Record is replete with speeches, debates, reports and discussions which tend to support the theory that the time lapse between 1901 and 1904 was because of a change in policy relating to the method of purchasing the lands, rather than the effect that the purchase would have. At 35 Cong. Rec. 3187-88 (1902) is the following statement:

> "Mr. Platt...it is true that several years ago, I think—in opening Indian reservations, we paid large and extravagant prices for the land to the Indians, upon the theory that the Government was going to be reimbursed for its expenditures by the settlers paying for the land which they settled upon, a sufficient sum to reimburse the Government. That went on for years, and everybody supposed that that was acceptable to the settlers. When the settlers began to agitate that the Government should remit to them the obligation which they had incurred to pay for the land, and thereby reimburse the Government, and the history of this agitation, of course, is well known. The Government remitted about $35,000,000 which it had paid to the Indians and which the settlers agreed to repay to the Government by the passage of that free homes bill."

At 35 Cong. Rec. 4801-02, Mr. Platt continues the discussion:

> "Now this particular agreement comes here to be ratified on a payment to

> the Indians of about $2.50 an acre for the surplus lands within their reservation which are under the agreement to be ceded to the United States and become part of the public domain. The Indians, in negotiating, said that was not a fair price for the land and they were worth a great deal more. But finally the negotiation was concluded. The agreement comes here. So far as the Senate considers it, it is an agreement to open a reservation—to pass ordinarily without any particular examination or any thought of the consequences to the government in the matter of expense. I will not go into history of the negotiations as to these lands, but the price paid or agreed to be paid to the Indians is $2.50 an acre for the entire acreage which is to be brought under the public domain by cession to the United States.
>
> The bill proposes that the land thus acquired shall be opened to homestead settlement without requiring any payment for the land settled upon from the settler. My amendment proposes that the settler pay $2.50 an acre, being the same which the government has agreed to pay to the Indians, and that thus the government shall be reimbursed for the amount expended for the purchase...." (Emphasis added)

And at 35 Cong. Rec. 4807, the following statement is seen:

> "Mr. Platt...here is this reservation in South Dakota. Of course the senators from South Dakota can speak more specifically of the character of the reservation and its surroundings than I can; but because we have to pay the Indians a certain amount for that reservation,

> as a matter of progressive Indian policy, for the purpose of separating the Indians and establishing the reservation or for the purpose of meeting the advancing demands of civilization for the use of the lands, it does not follow that the land is primarily and inheritantly worth so much an acre." (Emphasis added)

And finally, after the original bill was, in fact, amended this discussion takes place in the House of Representatives:

> "Mr. Burke...Mr. Speaker, this bill provides for the opening to settlement of 416,000 acres of land, now a portion of the Rosebud Reservation in South Dakota, being that portion of the reservation in Gregory County. In 1901 a treaty was entered into with the Rosebud Indians on the part of the United States, by which the Indians agreed to sell to the government this land for $2.50 per acre. That treaty was transmitted to Congress, and because of the fact that it provided that the government should pay for the lands outright and then take the chance of the Treasury being reimbursed by disposition of lands to settlers, it never got further than through the Committee on Indian Affairs, which unanimously reported it favorably. It was never given consideration in the House.
>
> Toward the concluding days of the last session of Congress, a new bill was prepared, substantially as this bill now provides, and that bill provided that the lands should be ceded by the Indians to the government, disposed of

> to settlers under the provisions of the Homestead Law, the price to be fixed at $2.50 per acre, as was provided in the original treaty. That bill did not receive consideration in the last Congress because of lack of time, but during the summer that bill was submitted to this tribe of Indians for their acceptance and 48 more than a majority consented to accept the terms of that bill. This bill is substantially the same as the bill which I have just referred to, except that the Committee, in view of a suggestion made by the Commissioner of Indian Affairs, in which he said he has no objection to the passage of this bill, provided the Indians were insured of as much money as they would have received under the treaty, instead of fixing the price at $2.75, which was provided in the bill submitted to the Indians during the summer, fixed the price at $3.00 per acre for all the lands taken within the first six months, and $2.50 for all lands taken thereafter.
>
> It was thought by the Committee that this would certainly insure the Indians as much money as they would have received under the original treaty, and, in my judgment, it insures their receiving considerably more. There is no opposition to the passage of this measure so far as I know." 38 Cong. Rec. 1423 (1904). (Emphasis added)

It appears, then, that the 1904 Act, as finally passed, incorporates verbatim, the entire text of the 1901 agreement with the exception of the 1901 lump sum section (the 1901 appropriation provisions). It appears that the new policy was, in fact, merely a change in an appropriations matter

and not a change in any substantive effect of the act in question. The extended discussions just quoted center on appropriations problems while assuming that the reservation would be extinguished and the land returned to the public domain. The Eighth Circuit Court of Appeals had occasion to consider the effect of this change in policy in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). In Condon, the Court said:

> "Appellee thinks it significant that the 1908 Act provided for the proceeds from the sale of the lands to be deposited into the Treasury of the United States and accredited to the Indians as was the case in the 1906 (Bonesteel) and 1910 (Fort Thom) Acts. This method contrasts with prior acts wherein payment for the land was made directly to the Indians. It has been aptly pointed out, however, that this was simply a new method utilized by a Congress that no longer favored purchasing Indian land and providing them free of cost to settlers." 470 F.2d 684, 687.

This Court, then, is satisfied that the 1901 agreement and the 1904 Act, concerning Gregory County, were considered by the Congress of the United States to be one and the same with the exception of the appropriation (homestead) provision. The true issue is, however, what was the intention of Congress with regard to the boundaries of the reservation in the 1904 Act.

What was the intention then of Congress in this opening of the portion of the Rosebud Reservation in Gregory County? It is now clearly established that the opening of an Indian reservation is not necessarily inconsistent with the reservation remaining geographically as large as it once was. Seymour v. Superintendent, supra; Mattz v. Arnett, supra. Again, legislative history is helpful in relation to these acts. c.f. U. S. ex rel. Condon v. Erickson, 478 F.2d 684, 688 (8th Cir. 1973); See, Mattz v. Arnett, 93 S.Ct. 2245, 2258 (1973).

Congressional Statements

There are many statements in the Congressional Record which tend to support the defendants' theory that the size of the Rosebud Reservation was, in fact, diminished by the 1904 Act. One quotation, in a committee report, is enlightening:

> "There is no question but that the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, which will be left compact and in a square tract, and a reservation about equal in size to the Pine Ridge Reservation in South Dakota." H.R. Rep. No. 443, 56th Cong., 2nd Sess. (1904).

Clearly the report suggests that the size of the reservation will be changed. A quick glance at a map will show that Gregory County must be removed to provide a "square treat". A copy of a page containing such a map is appended herein as Appendix A. The map is originally found at Comment, Tony Town, et al.: The Future of an Illusion, 18 S.D. Law Rev. 85, 129 (1973).

In addition, the following discussion takes place at 35 Cong. Rec. 4007:

> "Mr. Clatt...here is this reservation in South Dakota. Of course the senators from South Dakota can speak more specifically of the character of the reservation and its surroundings than I can; but because we have to pay the Indians a certain amount for that reservation, as a matter of progressive Indian policy, for the purpose of separating the Indians and extinguishing the reservation or for the purpose of meeting the advancing demands of civilization for the use of the lands, it does not follow that the land is primarily inherently worth so much an acre." (Emphasis added)

And again, in H.R. Rep. No. 443, 58th Cong. 2nd Sess. at p. 4 (1904), the following quotation is made of testimony of the Commissioner of Indian Affairs in front of the House Committee on Indian Affairs:

> "If you depend on the consent of the Indians as to the disposition of the lands where they have the fee to the land, you will have difficulty in getting it and I think the decision in the Lone Wolf case, that Congress can do as it sees fit with the property of the Indians will enable you to dispose of the land without the consent of the Indians. If you wait for their consent in these matters, it will be fifty years before you can do away with the reservations."

The law review article cited immediately above contains an extensive discussion of this matter.

It is difficult to read the House and Senate debates and reports without coming to the conclusion that the 1904 Act was an attempt to "do away" with the Rosebud Reservation in Gregory County. That purpose simply seems to be an assumption upon which all actions were taken and statements premised. Other materials similarly lead to that conclusion, however.

School Land Provision

Upon this state's admission to the Union, South Dakota's enabling act provided that:

> "Nor shall any lands embraced in Indian, military or other reservations of any character be subject to the grants or the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become part of the public domain." Act of Feb. 22, 1889, ch. 10, 25 Stat. 676

The 1901 agreement did not contain a school lands provision. However, Senator Gamble from South Dakota proposed, and the Senate adopted, a school lands provision in 1902. Senator Gamble explained to the Senate the reason for his amendment:

> "Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the land restored to and became a part of the public domain. This would withdraw about 29,000 acres of these lands and would leave 307,000 acres to be opened to settlement and which would be affected by the proposed amendment." 35 Cong. Rec. 3187 (1902).

Here is an unequivocal statement and corresponding action by the Senate of the United States premised solely and only upon the fact that the title of the Indians was extinguished and the lands restored to the public domain. It is a strong indication by Congress that its intention was to diminish the size of the Rosebud Reservation. The amendment was adopted without discussion, again buttressing the impression that the diminution of the Rosebud Reservation was a premise upon which all members of Congress acted when enacting the various Indian acts.

And again, when the school lands provision was proposed in the House of Representatives and a Rep. Finley questioned the appropriation for those school lands, Congressman Burke, a member of the House Committee on Indian Affairs, and a South Dakotan, responded:

> "I am glad that the gentleman has asked me that question. I would state that under the enabling act under which the State of South Dakota was admitted to the Union, it was provided that sections 16 and 36 in said state should be reserved for the use of the common schools of that state, and it further provided that as to the lands within an Indian reservation the portions of that grant would not become operative until the reservation was extinguished and the lands restored to the public domain. That enabling act was passed by Congress on the 22nd day of February, 1889. In March of that same year, Congress ratified a treaty with the Sioux Indians in South Dakota for the cession of something like ten or twelve million acres of land, and made an express appropriation, in accordance with that enabling act, to pay outright out of the Treasury the money for sections 16 and 36 of that land at the price stipulated for in the Treaty. Mr. Finley... 'Then as I understand the gentleman, he bases the wisdom or equity for this provision upon the enabling act admitting South Dakota into the Union. Mr. Burke, 'Yes'. Mr. Finley, "and not otherwise?' Mr. Burke, 'no'." 38 Cong. Rec. 1423 (1904).

The plaintiff herein makes reference to a statute (43 U.S.C.A. §865) which provides for the granting of school lands in opened reservations that are not restored to the public domain. This statute is not in point for it allows the state to select lands for school purposes prior to the opening of such reservation. However, the 1904 Act specifically referred to sections 16 and 36 in its granting of school lands and its legislative history indicates it was done in response to South Dakota's enabling act. This Court feels that 43 U.S.C.A. §865, in fact, lends weight to the argument that the express grant of school lands in the 1904 Act bolsters its position. Had Congress merely been "opening" the reservation for settlement, it could have used 43 U.S.C.A. §865 to supply the state of South Dakota with school lands. This method was not used, however.

The school lands provision stands as a clear indication of congressional intent to restore Gregory County to the public domain. See, United States ex rel. Condon v. Erickson, 478 F.2d 684, 686 (8th Cir. 1973). Other congressional enactments express the same intention, however.

Subsequent Enactments

In 1905 Congress passed an act to extend the time in which settlers could establish their residence in Gregory County under the homestead acts. As will be seen in the following quotations, there is a clear expression from Congress therein that Gregory County had ceased to be considered in the "congressional mind" as reservation or "Indian land". In Rosebud Sioux Tribe v. Kneip, 93 S.Ct. 2245, 2250 (1973), the Supreme Court discussed subsequent legislation to bolster its opinion that the reservation at issue therein had not been extinguished. In Senate Report No. 2760, 58th Cong., 3rd Sess., p. 1 (1905), the following appears:

> "The Committee on Public Lands, to whom was referred the bill to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Reservation, within the limits of Gregory County, South Dakota, having had the same under consideration, beg leave to report the bill back with the recommendation that it be amended, and that as amended it do pass." (Emphasis added)

Senator Gamble, in remarks before the Senate, found at 39 Cong. Rec. 1578 (1905), said the following:

> "I ask unanimous consent for the present consideration of the bill to provide for the extension of time within which homestead settlers may establish their reserve-

> tion upon certain lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, South Dakota..." (Emphasis added)

The operative language of the Act of February 7, 1905, ch. 545, 33 Stat. 700 is as follows:

> "An act to provide for the extension of time within which homestead settlers may establish residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County...." (Emphasis added)

Here then, is another clear indication that the Congress of the United States considered the reservation nature of Gregory County extinguished. Congress, in its act, had referred to this land as heretofore a part of the reservation.

Conclusion

This Court is of the opinion that the contemporary history of the 1904 Act indicates a congressional intent to extinguish that portion of the reservation. The defendant's brief reveals several contemporary documents and sources that buttress this opinion. At no time can this Court find an express discussion of state versus federal jurisdiction over the lands in question. However, the whole

tenor of the discussion in Congress convinces this Court that the purpose was to "do away" with the reservation in this area. This Court is convinced that the only interest that the Rosebud Sioux Tribe retained in the Gregory County lands was to be in the proceeds from the sale of those lands. There was never any question in anyone's mind but that the lands would be sold. At this time the demand for land for settlers was great.

The case of Ash Sheep Co. v. The United States, 252 U.S. 159, 40 S.Ct. 241 (1920) is not in point. The act in question therein contains several provisions which the 1904 Act does not. Ash Sheep itself recognized that each treaty must be judged by itself.

That being the case, it is this Court's judgment that the confines of the Rosebud Sioux Reservation were diminished by the 1904 Act and the reservation or Indian land nature was extinguished therein, and Gregory County restored to the public domain.

1907 ACT
(Tripp and Lyman Counties)

On March 12, 1907 Congress passed an act concerning Tripp County and a portion of Lyman County.[4] Each treaty or act must be analyzed separately to determine congressional

intent. See, U. S. v. Ash Sheep Company, 252 U.S. 159 (1920); Kills Plenty, et al. v. United States, 133 F.2d 292, 295 (8th Cir. 1943).

The operative language of the 1907 Act is as follows:

> "Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior be and is hereby authorized and directed as hereinafter provided, to sell or dispose of all that portion of the Rosebud Sioux Reservation in South Dakota lying south of the Big White River and east of Range 25 West of the 6th principal Meridian, except such portions thereof as have been or may hereafter be allotted to Indians..."

Again, this Court should examine the history of the 1907 Act to determine congressional intent.

Negotiations

In 1906 Inspector James McLaughlin conducted negotiations with the Rosebud Sioux Indians for the cession of their unallotted lands in Tripp and Lyman Counties. Inspector McLaughlin was the very person who conducted the negotiations for the 1901 agreement and the 1904 Act. It is interesting to note that the transcript of their discussion adds weight to this Court's conclusion that the 1904 Act diminished and extinguished the Rosebud Reservation. The following quotation

is found on page 5 of the hearing transcript held at the Rosebud Agency in 1906:

> "Inspector McLaughlin....There is no railroad running over any portion of the Rosebud Reservation, none within the boundaries of your reservation. That railroad in Gregory County has not yet come across your reservation boundary, but should it come into your reservation, you would receive pay for its right of way. Any of the Indians who may live in Gregory County whose allotments have been crossed by that railroad, have, or will receive pay for the privilege of crossing their allotments. So you need not worry about that, my friends." Dec. 14, 1906, Rosebud Agency Hearing by James McLaughlin, U. S. Indian Inspector, page 5.

It appears then that Inspector McLaughlin's assumption was that Gregory County was no longer a part of the Rosebud Sioux Reservation.

The Indian people during the negotiations expressed concern for the need of their land. Statements made by various Indians again buttressed this Court's opinion that the 1904 Act, in fact, diminished the reservation. A prime example is the following quotation:

> "High Pipe:....My friends, our Gregory County payment lasts two years yet. We all know that. The best land we have is in the eastern part of our reservation, Tripp County. The

> Indian people want to get land for their children there. They are very anxious to get land for their children down there." Rosebud Hearing, 1906, supra, page 8.

So it can be seen that the Indian members at this time recognized Tripp County as the eastern portion of their reservation. Gregory County does, of course, lie east of Tripp County. See map appended to this opinion. It is difficult for one to read the transcript of the negotiations in 1906 without feeling that this was merely a continuation of the original negotiation in 1901 which culminated in the Gregory County act, the 1904 Act, discussed above. That plainly is the import of all the discussion held therein. Chief Picket Pin, after discussing the Great Father's need for land said: "My friend, you are going home this time without any land." Rosebud Hearing, 1906, supra, page 7. The 1907 Act was clearly a continuation of the policies followed in the past. Not only the transcript of the negotiations for the 1907 Act indicate this conclusion, but the congressional history as well.

Congressional History

There are many statements contained in the Congressional

Record and various congressional reports which indicate an intent by Congress to diminish the confines of the Rosebud Reservation yet another time. As stated in H.R. Rep. No. 7613, 59th Cong., 2nd Sess. p. 1 (1907):

> "The purpose of this bill is to authorize the opening and sale of that portion of the Rosebud Reservation in South Dakota known as Tripp County, and it affects all that portion of the reservation east of Range 25 of the 5th Principal Meridian south of the Big White River and embraces about one million acres.
>
> In the second session of the 58th Congress a law was passed authorizing a sale of so much of this same reservation as was located in Gregory County, the tract affected being about one-half the area embraced in the tract affected by the pending bill and lying immediately adjoining and east of Tripp County."

The exact same statement may be found in S.Rep. No. 638, 59th Cong. 2nd Sess., p. 1 (1907). In addition, Congressman Burke stated on February 16, 1907, the following:

> "Mr. Burke from South Dakota....Mr. Speaker, the bill has the unanimous report of the Committee on Indian Affairs, in which committee it was very carefully considered. The bill is substantially in accordance with an agreement which has just been made with the Indians, signed by 42 more than a majority of the male Indians over the age of 18 years. It is in line with recent bills that have been passed affecting the sale of Indian Reservations.... The Indians, as I have

> stated before, have agreed to the disposition of it under the terms of the bill. They will have left, after this land is disposed of, a reservation that is substantially fifty miles square, and there are only 5,000 Indians." 50 Cong. Rec. 3104 (1907). (Emphasis added)

It can be seen, upon examining a map, that the quotation "fifty miles square" referred to in the quote relates approximately to the size of the reservation minus Gregory, Tripp and Lyman Counties. Mellette and Todd County make up a generally square area, roughly fifty miles on a side. Again, one can see the continuous policy with relation to the Rosebud Indian Reservation in opening the reservation, diminishing the reservation, and extinguishing the reservation nature of the lands concerned.

School Lands

Again, in the 1907 Act, the act makes provision for school lands as did the 1904 Act. The congressional committee reports state that the school land provision contained in the 1907 Act is for the same reason that the school land provisions were included in the 1904 Act already referred to and discussed above. The following report can be found at H.R. Rep. No. 7613, 59th Cong., 2nd Sess., pp. 3-4 (1907), and S.Rep. No. 6338,

59th Cong., 2nd Sess., p. 3 (1907):

> "Section 6 of the bill reserves sections 16 and 36 in each township for the use of common schools, and grants the same to the State of South Dakota. And section 7 makes an appropriation to pay for the same at $2.50 per acre. This is following the precedents which have heretofore been established in the opening of other reservations in South Dakota, and is based upon section 10 of the Act of Congress admitting South Dakota into the Union, approved February 22, 1889. Said section is as follows:
>
> > "Sec. 10. That upon admission of each of said states into the Union, sections 16 and 36 in every township of said proposed states, and where such sections, or any portion thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, or other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior; provided that the 16th and 36th sections embraced in permanent reservations for national purposes shall not at any time be subject to grants nor indemnity provisions of this act, nor shall any lands

> embraced in Indian, military or other reservations of any character be subject to the grants or the indemnity provisions of this act until the reservation shall have been extinguished and such lands restored to and become a part of the public domain.'"

Here again in the 1907 Act we have both the House and Senate reports on the bill referring specifically to the extinction of the reservation and the restoration of those lands to the public domain. This is a clear indication of congressional intent.

Allotments

In the case of Mattz v. Arnett, 83 S.Ct. 2245 (1973) the Court discussed the allotment provisions of the treaties involved. The Court in Mattz said:

> "The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated. This is apparent from the very language of 18 U.S.C. §1151, defining Indian country notwithstanding the issuance of any patent therein." 93 S.Ct. 2245, 2257.

There are allotment provisions in the 1907 Act. In Section 2 the following was stated:

> "... provided, that prior to said proclamation, the Secretary of the Interior, in his discretion, may permit

> Indians who have an allotment within the Rosebud Reservation to relinquish such allotment and to receive in lieu thereof an allotment anywhere within said reservation...."

The clear import of that section is that the Indians in the portion soon to be opened, were allowed to relinquish that part of the reservation and remove to the diminished portion of the reservation. The 1910 Act, to be discussed hereinafter, made that alternative explicit. It is clear that after that portion of the reservation had been opened, the land would be disposed of under the general homestead and townsite provisions and laws and that there would be from that time after no further allotments made in this area. The allotment provisions provided for or discussed in Mattz are as follows:

> "Provided, that any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment.... and the Secretary of the Interior may reserve from settlement, entry, or purchase, any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians...." See, 93 S.Ct. 2245, 2253.

It is clear from that quotation that the act in question contemplated a continuing presence or at least the option

to the Secretary of the Interior to declare a continuing presence of reservation in the area opened. No such provision is made in the 1907 Act herein. In fact, the import of the act contemplates no such continuing area that may be "set apart...for the permanent use and occupation..." of the Indian. The allotment section in the 1907 Act merely allows the Indians the option to keep the allotment that they then had or give up that allotment and remove to some other portion of the reservation prior to the proclamation of the Act. See, Sec. 2, Act of March 2, 1907. As can be seen from page 17 of the transcript of the hearing conducted by the Inspector McLaughlin with the Indians concerning the 1907 Act, the allotment provisions contained therein are to assure that all Indians within the Rosebud Reservation who had not before been allotted lands would receive such lands before such time as the settlers were allowed to homestead in the area. See Dec. 14, 1906, Rosebud Agency Hearing by James McLaughlin, U. S. Indian Inspector, p. 17. There is no provision in the 1907 Act for continuing allotment provisions.

Subsequent Enactments

And again, subsequent laws enacted by Congress refer to

Tripp County as "formerly within the Rosebud Reservation." See, Mattz v. Arnett, 93 S.Ct. 2245, 2250 (1973). The Act of January 11, 1915, 33 Stat. 792, is such an act:

> "An act providing for the purchase and disposal of certain lands containing the minerals kaolin, kaolinite, Fuller's earth, China clay, and ball clay, in Tripp County, formerly a part of the Rosebud Indian Reservation in South Dakota.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all lands containing the minerals known as kaolin, kaolinite, Fuller's earth, China clay and ball clay, in Tripp County in what was formerly within the Rosebud Indian Reservation in South Dakota, and has heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such minerals...." (Emphasis added)

Here then, is a subsequent act of Congress which specifically refers to Tripp County as having been separated from the Rosebud Reservation. It is a clear indication of the intent of Congress. Again, in the Act of August 17, 1911, Ch. 22, 87 Stat. 21, the language is as follows:

> "Be it enacted...that any person who has heretofore made a homestead entry for land in what was formerly a part of the Rosebud Indian Reservation in the State of South Dakota, authorized by Act approved March 2, 1907...."

The above must be taken as a clear indication of congressional intent with regard to the extinction of the reservation nature of the lands in Tripp County. Really no clearer indication could be asked for than acts of Congress which refer to the 1907 Act and to Tripp County as formerly within the confines of the Rosebud Reservation.

The defendants' brief contains numerous citations to other letters and reports of various government officials and agencies which constantly refer to the Tripp County section of the Rosebud Reservation as having been separated from the reservation, or having been formerly within the reservation. These contemporary documents must lend credence to the defendant's argument that it was, in fact, the intent of Congress to diminish the Rosebud Reservation once again by means of the 1907 Act. Again, the whole tenor of the contemporary documents seem to suggest to this Court that it was, in fact, the intent of Congress to diminish the Rosebud Reservation. The transcripts of the hearings held in 1906 and 1907 by Inspector McLaughlin constantly refer to the Gregory County Act and that taking in the same vein as the taking in 1907 by the Tripp County Act. There seems

to have been no question to the participants in those conferences but that the land would no longer be considered reservation land. There is the reference in the hearing transcript to Tripp County being the eastern section of the reservation and that this eastern section would then be taken. The Congressional debates once again seem to simply assume and have as their underlying premise that the separation and opening of Tripp County would work a diminution of the reservation. This Court is of the opinion that the surrounding circumstances, the congressional history and the contemporary documents of the 1907 Act clearly indicate the intention of Congress to diminish the Rosebud Reservation and extinguish the reservation nature of those lands in Tripp and Lyman Counties.

1910 ACT
(Gallette County)

Again, in 1910 Congress turned its eye to the Rosebud Reservation. Again the pressures for land for settlers were great, not only from the South Dakotans, but from people from the east who wished to move west. The response to this pressure was yet another bill to open the Rosebud Reservation for homestead settlement. The operative language of the 1910

Act is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior be and he is hereby authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Rosebud Reservation, in the State of South Dakota, lying and being within the counties of Mellette and Wabash,..."

Again, this Court must examine the Congressional Record and other contemporary history of the passing of the 1910 Act to determine the intent of Congress with respect to that act.

Congressional Statements

In January of 1910, Senator Crawford, discussing the Rosebud Reservation, made the following statement in the Congress of the United States:

> "Mr. Crawford...By treaties negotiated from time to time, and by laws enacted from time to time, the area of lands occupied by the Indians has gradually narrowed to smaller and smaller limits until now the lands owned by the Indians are comparatively small in quantity. They are not lands which in their possession bring any revenue whatever. They do not cultivate them. They neither fish nor game upon them. The policy of the government toward the Indians and toward these lands has changed in more recent years simply in this respect--

> ...that the land be sold and the proceeds be made into a trust fund, the principle forever held inviolate and the income from which is devoted to the Indians .... 45 Cong. Rec. 1066 (1910).

By this statement one can see the indication that Congress considered the openings in the three acts discussed so far to be a continuous process of narrowing the range upon which the Indians would roam and "civilizing" that part of the western United States. The statement above stands mainly for the proposition that each of the acts must be viewed in light of the other.

In Senate Report No. 887, 60th Cong., 2nd Sess., p.p. 1-2 (1909), the following report is made to the Senate of the United States concerning what was to become the 1910 Act:

> "The present area of the Rosebud Indian Reservation aggregates 1,800,000 acres. The land proposed to be opened to settlement under the provisions of this bill embrace an area of about 900,000 acres.... It was at first contemplated to submit this bill, through an Indian inspector, for the consideration of the Rosebud Indians, but the Inspector, who for a number of years has had that especial work in charge, is otherwise occupied and has been unable to take it up and it is felt by the Committee that the provisions of the bill are fair and just to the Indians in all respects.

> and it would delay the consideration of the matter unduly if the action were withheld for that purpose and the measure could not receive consideration during the present session of Congress.
>
> "The reservation is yet large, and in the judgment of your Committee the surplus and unallotted lands are unnecessary for the use of the Indians .... It also provides that the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area proposed to be opened to relinquish such allotment and receive in lieu thereof allotments anywhere within the reservation proposed to be diminished." (Emphasis added).

And in a report in the House of Representatives, H.R. Rep. No. 429, 61st Cong., 2nd Sess. p. 2, (1910), the following statements are made:

> "The Rosebud Indian Reservation when set aside as a separate reservation under the Sioux Act of 1889, contained something over 3,000,000 acres of land. In 1904 the unused and unallotted portion of the reservation in Gregory County, about 500,000 acres, was disposed of and the Indians received therefrom something more than $1,500,000. In the 59th Congress a law was enacted authorizing the sale of the unused and unallotted lands in that portion of the reservation in Tripp County, comprising about 1,000,000 acres, under a bill substantially in the same form as the bill now under consideration, except that the price of the land was fixed in the law, whereas under this bill the price is to be fixed by appraisement....

> "The area comprised in the present bill is about 600,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. There will still be left a reservation containing 1,000,000 acres, and as the Indians have all been allotted, there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of. (Emphasis added).

Here, perhaps, is the strongest statement yet in a House of Representatives committee report concerning each of the acts in question, in this Court's opinion. The committee starts by saying that the reservation was once 3,000,000 acres of land and finishes by saying that after the passage of the 1910 Act the reservation would contain only 1,000,000 acres. The report says that there is no need for a continuing of a reservation larger than the one that will result after the opening and disposal of the land in Mellette County. There can be little question from reading this House Report but that the House of Representatives contemplated a diminished reservation by not only the 1910 Act, but the acts passed in 1904 and 1907 as well. In addition, Mr. Burke from South Dakota made the following statement during the debates on the 1910 Act:

> "I might say, Mr. Speaker, that there are two propositions to be considered in disposing of the unallotted and unused lands on Indian reservations. One is at the earliest possible date, to get among the Indians, the white men and have those lands that are of no benefit to anyone that are lying idle, doing no good, opened up and developed into farms, and I believe that the placing through what were heretofore reservations, actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to those allotments which at present are of little value." 45 Cong. Rec. 5457 (1910)

School Lands

Again, the 1910 Act provides for school lands as did the 1904 and 1907 Acts. The Senate Report No. 887, 60th Cong., 2nd Sess., p. 2 (1909) provides:

> "Section 16 and 36 of the lands in each township are not to be disposed of, but are reserved for the use of the common schools of the state, and those lands are to be paid for by the government in conformity with the provisions of the act admitting the State of South Dakota into the Union."

H.R. Rep. No. 429, 61st Cong., 2nd Sess., p. 2 (1910), states almost the identical language in its report to the House concerning the bill. This Court has discussed in the sections

on the 1904 and 1907 Act what it feels the import of the school lands provision is. Certainly the enabling act which admitted South Dakota to the Union discussing the disestablishing of the reservation and its return to the public domain must be a strong indication of congressional intent in this regard.

Intoxicants

Section 10 of the 1910 Act prohibits the introduction of intoxicants into the lands concerned with in this act. There is no dispute but that at this time there were federal laws prohibiting the introduction of all forms of intoxicants into "Indian country". The plaintiff would attach to this provision the congressional intent to continue the lands in Mellette County as Indian lands. This Court thinks, on the contrary, that the limiting of the prohibition of intoxicants to 25 years, clearly indicates an intent of Congress that this was not to be considered henceforth Indian land. Evidently Congress felt that it must provide a special section to prohibit such intoxicants for a period of time to protect the Indians who still had allotted lands in that area. If Mellette County continued to be "Indian land", why would

Congress feel the need to enact a specific act continuing the liquor prohibition, but only continuing it for a period of years? An eminent scholar on Indian law has the answer to that question:

> "In connection with the power to regulate commerce with the Indian tribes there exists also the authority granted by the Constitution to do all things necessary and proper by way of carrying out its provisions. Pursuant to this power and the power over the territory and other property belonging to the United States, the federal government has imposed liquor restrictions on land ceded to it by the Indians when these lands adjoined Indian country. The purpose of this measure was to prevent sale of liquor on the boundaries of the land retained by the Indians. Except for these extensions of the liquor laws into "buffer" areas the states would have had the exclusive police power thereon. Such extensions have been repeatedly upheld by the Supreme Court." F. Cohen, Handbook of Federal Indian Law, (University of New Mexico Press) p. 353 (1942 ed.).

An interesting and enlightening discussion concerning the liquor provisions is found at 45 Cong. Rec. 5463-64 (1910):

> "Mr. Coebel.... I am opposed to attaching to the sale of any reservation, conditions such as are proposed in this bill.
> Mr. Gronna.... Does the gentleman believe it would be safer on a reservation where liquors are permitted to be sold?

> Would the gentleman not buy land on a reservation where protection is given by the government, even if such reservation is located in a prohibition state?
> Mr. Coebel.... Oh, I do not know what I would do. At present I would want to get the land without any conditions attached. You must also bear in mind that when the lands are sold, there is no longer a reservation and the laws of the state apply....
> Mr. Butler.... If the land is sold it will be no longer an Indian reservation. It is where, as I understand, the Indian has always lived and where he is going to live, and I believe in keeping the sale of liquor out of his neighborhood, and for that purpose I propose in a kind and gentle way to suggest to gentlemen that if there is to be an attempt made to prevent a restraint being imposed upon this title, they had better have a quorum of the House present to insure the success of the attempt." (Emphasis added).

Clearly this discussion indicates that the participants did not feel that the lands to be ceded and opened were reservation but that the liquor prohibition should be continued and remain so that the Indians who had an allotment in Mellette County would not be exposed to or affected by or tempted by "demon rum". It is this Court's opinion that the Indian agency and Indian schools provided for in Section 1 of the 1910 Act also fit within this rationale. Congress knew that various members of the Rosebud Sioux Tribe had taken allotments in

the lands soon to be ceded, and these provisions attempted to continue to provide for those people in that area, although the land would no longer be considered as reservation.

Allotments

This Court has discussed, in relation to the allotment sections of the 1907 Act, the United States Supreme Court's recent opinion in the case of Mattz v. Arnett, 93 S.Ct. 2245 (1973). In the Mattz opinion the Supreme Court made reference to the continuing nature of the allotment provisions to buttress its opinion that the Congress of the United States had no intention to extinguish the reservation nature of the lands involved. The 1910 Act which we are concerned with herein, also has certain allotment provisions contained in it.

> "Provided, that any Indians to whom allotments have been made in the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation;" (Emphasis added.)

This allotment section is addressed in Senate Report No. 887, 887, 60th Cong., 2nd Sess., p. 2 (1909):

> "It also provides that the Secretary of the Interior in his discretion, may permit Indians who have an allotment within the area proposed to be opened to relinquish such allotments and receive in lieu thereof allotments anywhere within the reservation proposed to be diminished."

This whole concept seems to be contrary to the concept that Mellette County continued as reservation land. In fact, in this Court's opinion, this allotment section provides the strongest indication yet that the area in question was no longer to be considered "Indian land". Congress, in effect, offered to allow Indians to exchange and take their allotments in what would continue to be Indian land so that they might continue to benefit from all of the programs that the government had on the reservation. They need not retain their allotment in what was no longer to be considered a reservation. Clearly there is no other reasonable explanation for such a provision.

Subsequent Enactments

As with the other acts described herein, subsequent acts of Congress lend credence and buttress this Court's opinion as to the effect of the 1910 Act. The Act of March 3, 1919,

40 Stat. 1420, provided as follows:

> "The Secretary of the Interior is hereby authorized to sell and convey to the White River Cemetary Company, for cemetary purposes, for a price not less than the appraised value thereof, a ten acre tract within the former Rosebud Indian Reservation in Mellette County, South Dakota, described as the NE¼ of the SE¼ of the NE¼ of Sec. 34, Twp. 42 N., Rg. 29 W., 6th Principal Meridian, or such part thereof as may be required:"

Again, this is an indication that Congress regarded Mellette County as having been separated from the Rosebud Reservation and restored to the public domain. See, Matts v. Arnett, 93 S.Ct. 2245, 2258 (1973).

Conclusion

Again, the defendant cited to this Court reports and letters from various government bodies, officials and interested people which tend to confirm this Court's opinion that Mellette County was intended to be severed from the reservation and returned to the public domain. The school lands section, the intoxicants section, the allotments section all lend credence to this Court's opinion. This Court feels that the clearest indication yet of the congressional intent to diminish the Rosebud Reservation is expressed in the 1910

Act and the congressional history surrounding that act. It is clear from the congressional history that Congress viewed the 1904, the 1907 and the 1910 Acts as one continuous program of reducing the size of the various Indian reservations in the State of South Dakota so that settlers from the east could come in and acquire the land they so hungered for and so that the Indian people of South Dakota would become "more civilized". There is no doubt in this Court's mind, after having reviewed the contemporary documents from the passage of the 1910 Act, and the congressional history thereof, that the Congress of the United States had the intention of diminishing the Rosebud Reservation and restoring Mellette County to the public domain under the jurisdiction of the State of South Dakota thereby.

CONCLUSION

The plaintiff brought this declaratory judgment action seeking declarations that the acts of Congress discussed herein, did not diminish the Rosebud Sioux Reservation or alter its boundaries from those defined in the Act of March 2, 1889. This Court has felt compelled to investigate and examine the legislative history of the three acts in question

in order to make a determination in this action. See, Mattz vs. Arnett, supra; Seymour v. Superintendent, supra; and United States ex rel. Feather v. Erickson, supra. As the United States Supreme Court said in the Mattz case, "A congressional determination to terminate must be expressed on the face of the act or be clear from the surrounding circumstances and legislative history." 93 S.Ct. 2245, 2258. It is this Court's opinion after having examined all the contemporary legislative materials, various government reports and discussions that the whole context of the acts from 1904 through 1910 had but one purpose in mind. It is clear that the purpose of those acts was to open those reservations to non-Indian settlers and to civilize those areas in what the Congressmen obviously regarded as an uncivilized portion of the United States. As each successive act was proposed in Congress various reports referred to a continuing diminished size of the Rosebud Reservation. Originally the reservation was said to comprise 3,000,000 acres, and later 1,800,000 acres, and finally to comprise a reservation roughly the size of 1,000,000 acres. The allotment sections, the school lands provisions, the many negotiations conducted by Inspector McLaughlin, the congressional reports and debates, and the

subsequent congressional enactments for each act lead this Court to believe and be of the opinion that the surrounding legislative history and the circumstances clearly indicate a congressional intent to separate each of the counties concerned, to return those counties to the public domain, and to extinguish the reservation or "Indian land" nature of those counties thereafter.

Certainly this is the treatment that has been accorded those counties from the time of the acts' passage on. There is no dispute but that the State of South Dakota has treated the counties of Mellette, Tripp, Gregory and what was at that time Lyman County, as portions of the state over which the State of South Dakota can exercise jurisdiction since the passage of those acts. In fact, the Eighth Circuit Court of Appeals has in the past assumed, but clearly without deciding, that Todd County was the Rosebud Reservation and that other acts had affected the territorial nature of the reservation. In Beardslee v. United States, 387 F.2d 200, 205 (8th Cir. 1967), the Court said:

> "All of Todd County is obviously within the original boundaries of the Rosebud Reservation.... Only three acts of Congress have affected the territory of the reservation since its establish-

ment in 1962 and none of these concern Todd County."

The Court then went on to cite the very three acts which this Court is concerned with herein. The above is cited not for the fact that the Eighth Circuit had decided the jurisdictional questions herein, but only for the fact that the jurisdictional boundaries were treated by common usage, to have been diminished by the three acts in question. This is distinguished from the situation in Seymour. See, Seymour v. Superintendent, 368 U.S. 351, 359 (1962).

This Court feels that the following report by the Commissioner of Indian Affairs cited to this Court by the defendants and given in 1912 is very enlightening upon the whole subject discussed at length herein:

> "Under various acts passed by Congress within recent years, certain lands ceded by the Indians to the United States are open to settlement and entry, and the government endeavors to dispose of them at their appraised value to the benefit of the Indians.
>
> "Nearly all such acts contain a clause practically identical with the following:
>
> > 'That nothing in this act shall in any manner bind the United States to purchase any portion of the lands herein described...[1]

> or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided.'
>
> "It has been the practice to consider such lands under the jurisdiction and supervision of the General Land Office from the passage of the act, and the Indians' title thereto extinguished. On this theory the public at large has come to consider said lands a part of the public domain, and the lands have therefore been used indiscriminately by various interests, principally for grazing purposes, without compensation to the Indians.
>
> "By departmental decision of November 27, 1911, it was held in effect that the Indians' title to such land is not extinguished until the date of entry, settlement, or sale, and the Indians are entitled to their use, or to any revenue that may be derived from their use by others, pending date of settlement, sale or entry." Report of the Commissioner of Indian Affairs, p. 51 (1912). (Emphasis added).

The Commissioner did not question that the lands returned to the public domain but only when they did so.[1]

This Court has examined the issues involved here very closely. The decision herein affects a large portion of the State of South Dakota. The decision will have great political, social, cultural and economic effects. From the time these acts were passed, these counties have been treated as outside the Rosebud Sioux Reservation by the settlers, their descendents, the State of South Dakota and the federal courts.

There can be little doubt but that the members of Congress coveted the Indian lands. This Court must determine the intent of Congress as it existed at the turn of the century. Time and again the Indians were given reservations, only to have the settlers' need for land mandate a redefining of the reservation boundaries. While this Court does not necessarily agree with the mores or the methods employed at that time, there is little doubt that the congressmen were engaged in the process with the "doing away" of the reservations. This Court's only function is to determine congressional intent, not to rewrite history.

This Court is aware of the many decisions that various courts have rendered regarding the jurisdictional boundaries of various Indian reservations. However, each congressional act and treaty is different and must be so examined. As the

Eighth Circuit Court of Appeals said in Killa Plenty, et al. v. United States, 133 F.2d 292, 295 (8th Cir. 1943):

> "It can, of course, be argued that the words 'within the limits of any Indian reservation' should mean the same thing in any statute, but the argument, we think, is unsound.... To find that meaning the words must be viewed in their setting and the history and purpose of the act must be considered."

The surrounding circumstances, the history, congressional and otherwise, and various documents, convince this Court that the three acts in question did diminish the Rosebud Sioux Reservation and that the State of South Dakota can exercise jurisdiction over Indian people in the counties of Gregory, Tripp, Mellette, and that was Lyman.

The defendants herein shall forthwith prepare the necessary papers to effectuate the opinion of this Court as expressed in this Memorandum Opinion.

BY THE COURT:

ANDREW W. BOGUE, JUDGE
United States District Court

APPENDIX NO. 3

Supreme Court, U. S.
FILED
AUG 7 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent,
United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent,
United States of America ex rel.
AMBROSE ST. JOHN, Respondent,
United States of America ex rel.
JAMES R. KEEBLE, Respondent,
United States of America ex rel.
CURTIS SMALL, Respondent,
United States of America ex rel.
ROMAN V. DERBY, Respondent,
United States of America ex rel.
JOSEPH DAY, Respondent,
United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent,
United States of America ex rel.
CLARENCE WALKER, Respondent,
United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 8, 1974
CERTIORARI GRANTED JUNE 3, 1974

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SECTION 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

ROSEBUD SIOUX TRIBE, Appellant-Plaintiff,	)	
-vs-	)	No. 74-1211
HONORABLE RICHARD KNEIP, et al., Appellee-Defendant.	)	

Appeal from a judgment of the United States District Court for the District of South Dakota declaring that Congress disestablished three-fourths of the Rosebud Indian Reservation

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BRIEF FOR APPELLANT-PLAINTIFF

MARVIN J. SONOSKY
2030 M Street, N. W.
Washington, D. C. 20036

Attorney for Appellant-Plaintiff

Local Counsel:

John E. Goodrich
216 East Capital
P. O. Box 1084
Pierre, South Dakota 57501

May 1974

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IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

ROSEBUD SIOUX TRIBE, Appellant-Plaintiff, -vs- HONORABLE RICHARD KNEIP, et al., Appellee-Defendant.	)	No. 74-1211

Appeal from a judgment of the United States District Court for the District of South Dakota declaring that Congress disestablished three-fourths of the Rosebud Indian Reservation

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BRIEF FOR APPELLANT-PLAINTIFF

Jurisdictional Statement

The jurisdiction of the district court was invoked under 28 U.S.C. 1362. The judgment below was entered February 15, 1974. (App. I, p. 81.) [1/] The notice of appeal was filed March 13, 1974. (App. I, p. 82.) The jurisdiction of this Court is invoked under 28 U.S.C. 1291. The opinion of the court below appears in Appendix I at pages 27 through 80.

1/ Appendix I, hereinafter cited "App. I, p. ___" includes the portions of this record designated pursuant to Rule 30(b) F.R.App.P. Appendices II, III, IV (hereinafter cited e.g., "App. II, Doc. ___"), are appendices to the brief and include copies of Congressional materials and official documents, mainly from the National Archives.

Statement of the Issue for Review

Whether any of the Acts of April 23, 1904, c. 1484, 33 Stat. 254; March 2, 1907, c. 2536, 34 Stat. 1230; and May 30, 1910, c. 260, 36 Stat. 448, providing for the disposal of unallotted tribal land, disestablished any part of the Rosebud Sioux Indian Reservation as defined in the Act of March 2, 1889, c. 405, 25 Stat. 888?

Statutes Involved

The full text of the three statutes cited in the statement of the issue for review is set out at the end of this brief at pages 60-71, infra.

Statement of the Case

This is an appeal from a declaratory judgment of the United States District Court for the District of South Dakota (Honorable Andrew W. Bogue) holding that Congress disestablished about three-fourths of the Rosebud Sioux Indian Reservation through three statutes enacted in 1904, 1907, and 1910, providing for the disposal of unallotted tribal land.

The reservation status of the Rosebud reservation turns on the meaning and effect of those three statutes. But that meaning and effect takes life only in the context of the history of the reservation. The Sioux landholdings had

early beginnings, but we commence with the famous Treaty of Fort Laramie of September 17, 1851, 11 Stat. 749, where the United States defined and recognized the countries of seven Indian nations including a portion of the country of the Sioux Nation, extending from the Missouri River to the Rocky Mountains.[2/]

Increasing emigration through Sioux country generated hostilities culminating in the Treaty of April 29, 1868, 15 Stat. 635, between the United States and the Sioux.[3/] Article 2 of that treaty established the Great Sioux Reservation embracing all of South Dakota west of the Missouri River and a thin slice of North Dakota.[4/] In the same article the Sioux ceded their country outside of the Great Sioux reservation, retaining hunting and other rights in the ceded area.

In the 1868 Treaty the United States made three solemn promises that have bearing here. First, that the Great Sioux Reservation was "set apart for the absolute and undisturbed use and occupation" of the Sioux (Article 2). Second, that no one other than the Sioux and authorized Federal personnel "shall ever be permitted to pass over, settle upon, or reside" on the reservation (Article 2).

2/ For a general history of the 1851 Treaty see Crow Tribe v. United States, 151 Ct. Cl. 281 (1960), certiorari denied 366 U.S. 294; Sioux Tribe v. United States, 97 Ct. Cl. 613, Fdg. 1, 616-619 (1942), certiorari denied 318 U.S. 789. For a definition of the Sioux country delimited in the 1851 Treaty, see Sioux Nation v. United States, 15 Ind. Cl. Comm. 577 (1965), modified 21 Ind. Cl. Comm. 371 (1969).

3/ Sioux Tribe v. United States, 97 Ct. Cl. 613, Fdgs. 2, 3, 4, pp. 619-627 (1942), certiorari denied 318 U.S. 789.

4/ Cession Nos. 598, 632, Dakota 1, Indian Land Cessions, 18th Annual Report, Bureau of American Ethnology (GPO 1899), generally known as Royce Land Cessions.

Third, that no cession "of any portion or part of the reservation *** shall be of any validity *** unless executed and signed by at least three-fourths of all the adult male Indians" occupying the reservation (Article 12). None of these promises was kept.

The famous Black Hills country of South Dakota located in the western portion of the Great Sioux Reservation was early coveted for its known gold value. Faced with the Sioux refusal to consent to sale by three-fourths of the male adults as required by Article 12 of the 1868 Treaty, Congress abrogated the Sioux rights outside the Great Sioux Reservation and unilaterally took the Black Hills area, about one-fourth of the reservation, without the consent of the Sioux. Act of February 28, 1877, c. 72, 19 Stat. 254.[5/] This left about 18 million acres in the reservation.

The process of attrition continued. In 1889 about half of the diminished Great Sioux Reservation was divided into six smaller reservations.[6/] With specified exceptions, the estimated 9.2 million acres[7/] outside of the six reservations were explicitly "restored to the public domain" to be sold at prescribed prices

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5/ Sioux Tribe v. United States, 146 F.Supp. 229 (1956) not in the official Court of Claims reports because the decision was vacated and the case remanded for new trial for reasons not pertinent here. An account of the post-decision proceedings appears in 182 Ct. Cl. 912-913 (1968). A history of this phase is set out in some detail in Sioux Tribe v. United States, 33 Ind. Cl. Comm. 151, 159-163 (1974) where the Indian Claims Commission held that the 1877 Act constituted a taking under the Fifth Amendment (idem, 218).

6/ The Santee Sioux reservation in Nebraska was not carved out of the Great Sioux Reservation. At the time of the 1889 Act the Santee Sioux already possessed a reservation in Nebraska. Act of March 2, 1889, supra, sec. 7.

7/ Acreage from Sioux Tribe v. United States, 105 Ct. Cl. 658, 710 (1946).

with the net proceeds credited to the Sioux. Act of March 2, 1889, c. 405, secs. 1-6, 21, 22, 25 Stat. 888 (referred to by the Indians as "General Crooks Treaty"). Section 19 continued in force all the provisions of the 1868 Treaty. The 1889 Act was executed and signed by at least three-fourths of the male adult Sioux, as required by Article 12 of the 1868 Treaty, reaffirmed by Section 28 of the 1889 Act, and spelled out in the President's Proclamation of February 10, 1890 (26 Stat. 1554), confirming the Indian approval of the 1889 Act. One of the six smaller reservations defined in the 1889 Act was Rosebud, "set apart for a permanent reservation for the Indians receiving rations and annuities at the Rosebud Agency."

The 1889 Act (secs. 8-11) directed that allotments of reservation lands be made to each Indian man, woman, and child, within each of the six reservations. The Act also authorized the Secretary to negotiate within each reservation for the purchase of such unallotted land as the tribe shall "consent to sell" (sec. 12).

Commencing with Rosebud in 1904 and continuing until 1910, the United States, without the required "consent to sell", unilaterally opened to settlement the unallotted tribal land on five of the six reservations. This was

accomplished through eight statutes,[8] often termed "surplus" land statutes because the Government referred to the land as "surplus" to the Indians' needs. In no instance did the Tribe sell and the United States buy the tribal land. In no instance was the land restored to the public domain. In no instance did three-fourths of the Sioux male adults consent as required by Article 12 of the 1868 Treaty and section 28 of the 1889 Act.

Three of the eight surplus land statutes related to the Rosebud reservation. As delimited in the 1889 Act, the Rosebud reservation contained 3,228,160 acres (1 Kappler 1041), embracing all of present day Todd, Mellette and Tripp counties, most of Gregory and a few townships in Lyman county. The three Rosebud "surplus" land statutes affected 2, 442,318 acres covering three-fourths

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8/ a. Rosebud: Act of April 23, 1904, c. 1484, 33 Stat. 254, affecting tribal reservation lands in Gregory and Lyman counties; Act of March 2, 1907, c. 2536, 34 Stat. 1230, affecting tribal reservation lands in Tripp County; and Act of May 30, 1910, c. 260, 36 Stat. 448, affecting tribal reservation lands in Mellette and Washabaugh counties. (The county lines were redefined in 1911 so that the reservation lands in Washabaugh fell into Mellette county. S.D. Session Laws, 1911, c. 108, sec. 2.

b. Pine Ridge: Act of May 27, 1910, c. 257, 36 Stat. 440, affecting tribal reservation lands in Bennett County.

c. Cheyenne River: Act of May 29, 1908, c. 218, 35 Stat. 460, affecting tribal reservation lands.

d. Standing Rock: Act of May 29, 1908, supra, and Act of February 14, 1913, c. 54, 37 Stat. 675 affecting tribal reservation lands in North Dakota and South Dakota.

e. Lower Brule: Act of April 21, 1906, c. 1645, 34 Stat. 124, affecting tribal reservation lands.

f. Crow Creek: No comparable statute since the initial reservation was so small.

of the Rosebud reservation, -- all but the portion in Todd county. GAO report, pp. 1619, 1653, 1707-08. (App. IV, Doc. 55.)[9]

By 1901, 4508 allotments had been made pursuant to sections 8-11 of the 1889 Act. The allotments were spread throughout the Rosebud reservation[10] and 4917 Indians were living in all of the present day counties and portions of counties within the reservation.[11] CIA, 1901, p. 371. (App. IV, Doc. 40A.) In 1901 the United States negotiated an agreement for the voluntary sale by the Tribe of 416,000 acres of unallotted reservation lands in Gregory county for $1,040,000. The Indians consented by the requisite three-fourths majority of the male adults. Agreement of September 14, 1901, printed in Sen. Doc. 31, 57th Cong., 1st sess. (1901). (App. II, Doc. 3, p. 28.) But Congress never ratified the sale. (App. I, op. 34.) Instead, by the 1904 Act, and twice again by the 1907 Act and the 1910 Act (p. 6, fn. 8, supra), Congress unilaterally, without the consent of the Tribe, directed that unallotted lands identified in those acts, be disposed of under the homestead and townsite laws at the prescribed prices, with the proceeds to be credited to the Tribe.

9/ "GAO" - General Accounting Office reports furnished by the Comptroller General to the Court of Claims in connection with Indian claims cases before the court. Area of Rosebud Reservation in Gregory county - 521,512.56 acres (p. 1619); in Tripp county -- 1,083,680.11 acres (p. 1653); and in Mellette county -- 837,125.78 acres (p. 1707). Total -- 2,442,318 acres.

10/ A copy of an early, large official map found in the National Archives showing the location of the allotments will be available, with the consent of the Court, at oral argument.

11/ "CIA" - Report of the Commissioner of Indian Affairs.

In addition to the 4508 allotments made up to 1901, allotments continued to be made in the areas affected by the three Rosebud statutes until the dates the President proclaimed the "surplus" lands open for disposal in 1904, 1908, and 1911, respectively.[12/] Consequently, when the lands were ultimately opened, the nonIndian homesteaders found the Indian allottees already in the area. Over the years, this intermixture also led to conflicts when the State and its political subdivisions, in derogation of tribal and Federal law, undertook to subject reservation Indians to State law. (App. I, op. 28.) To resolve these problems, this suit was instituted in the name of the Tribe by legal assistance lawyers acting without an approved contract under 25 U.S.C. 81 et seq.

The complaint, as amended, named as defendants, the four counties (Gregory, Lyman, Tripp, Mellette), the Governor and the Attorney General of South Dakota. Later the United States was joined as a defendant. (App. I, caption docket entries; docket entry, 1/11/73.) The amended complaint charged that the State of South Dakota and the counties were exercising jurisdiction over Indians on those portions of the reservation within the four counties. The Tribe asked for a judgment declaring in effect that the boundaries of the reservation as fixed by the 1889 Act, were not affected by the three "surplus" land statutes of 1904, 1907, and 1910. (App. I, pp. 9-10.)

12/ Proclamations of May 13, 1904 (32 L.D. 622); August 24, 1908 (37 L.D. 122); and June 29, 1911 (40 L.D. 164). Up to June 30, 1926, a total of 8,574 allotments had been made on Rosebud to Indians of the Rosebud reservation. GAO report, Vol. I, p. 263, Court of Claims No. C-531 (1934). (App. IV, Doc. 54.)

The answer of the United States preserved its defense of sovereign immunity, but otherwise agreed with the substantive claim of the Tribe. (App. I, p. 26.)

The defendants' answers admitted that State jurisdiction was being exercised over Indians within the counties as charged in the amended complaint, but defended on the ground that such territory was not within the exterior boundaries of the Rosebud reservation. (App. I, pp. 10-24.)

The Tribe through the legal assistance lawyers, argued to the district court that there was no controlling distinction between the three "surplus" land statutes affecting Rosebud, and the "surplus" land statutes construed not to disestablish the reservations in Seymour v. Superintendent, 368 U.S. 351 (1962); City of New Town, North Dakota v. United States, 454 F.2d 121 (C.A. 8, 1972); United States v. Erickson, 478 F.2d 684 (C.A. 8, 1973); and State v. Molash, 199 N.W.2d 591 (S.D. 1972).

The defendant Attorney General of South Dakota filed a separate brief attacking the validity of this Court's construction of "surplus" land statutes, similar to Rosebud's, in City of New Town and Erickson, supra. The defendant Attorney General suggested that this Court "would appear to be in substantial conflict as to its interpretation of the legislative history of the Rosebud and similar Acts" and therefore the trial court was free to "make an independent evaluation of the legislative history of the Rosebud Acts ***." (p. 8 of trial brief for defendant Attorney General, reproduced in Appendix IV, Doc. 57).

The defendant four counties, referring to Seymour, New Town, Erickson, and Molash, as "recent decisions", argued that those recent decisions should not be followed because they were based on an inadequate legislative and historical review.[13] In fact, the four counties told the trial court that it was:

> "*** the first court to have the opportunity of deciding the issue in its proper historical perspective and in light of the legislative history available --
>
> * * * * * * * *
>
> Because at the time the recent decisions were made, not one of the courts involved was presented with either the legislative and historical origins of this particular form of reservation legislation or the legislative history of the particular act under consideration." (emphasis in original.) [14]

The trial court briefs of the defendant four counties were heavily interlarded with selected excerpts from documentary material in support of their argument that Congress intended to disestablish the portions of the reservation affected

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13/ The four counties told the trial court "*** that none of these [recent] decisions has been made in light of either an adequate legislative history of the particular act under consideration or the historical origin of the acts in general. As a result, the recent decisions have accepted a proposition similar to plaintiff's position that the acts 'were not expressions of Congressional intent to diminish or alter the boundaries of the Rosebud Reservation'." The full text appears on page 1 of the four counties brief reproduced in Appendix IV, Doc. 58.

On page 48, fn. 24 of the same brief, the four counties observed that they could not find legislative materials, which they deemed pertinent, in the Supreme Court briefs in Seymour, and implied that the Supreme Court must have decided Seymour without adequate legislative history. The full text of page 48 of the four counties' brief below is reproduced in App. IV, Doc. 58.

14/ Four counties brief below, page 45, reproduced in Appendix IV, Doc. 58.

by each of the three surplus land statutes of 1904, 1907 and 1910. Despite the four counties' charge that the Supreme Court, this Court and the Supreme Court of South Dakota rested their decisions in the "recent" cases on inadequate legislative and historical review, the four counties did not place in the record, or furnish as appendices to their briefs below, the documents that they say make their case.

The district court ruled against the Tribe. In an extensive opinion (53 pages), the court recognized the principle that Indian statutes must be liberally construed with all doubt resolved in favor of the Indians, and the guidelines controlling the construction of the three Rosebud statutes. The court expressed awareness that its decision would have "great political, social, cultural and economic effects." (App. I, op. 30-36, 78.) Nevertheless, the court was convinced that the "surrounding legislative history and circumstances clearly indicate a Congressional intent [manifested by the three Rosebud statutes] to separate each of the counties concerned, to return those counties to the public domain, and to extinguish the reservation or 'Indian land' nature of those counties thereafter." (App. I, op. 75.) This conviction, based on the premise that the surplus land statutes extinguished Indian title and restored the land to the public domain, is the basis for the district court's judgment, declaring that the 1904, 1907, and 1910 Acts "did extinguish the reservation or 'Indian land' nature of the unallotted surplus lands in said counties by returning them to the

public domain, and did diminish the geographical location of the boundaries of the Rosebud Sioux Reservation to coincide with the boundaries of Todd County, South Dakota." (App. I, p. 82.)

This appeal followed.

Argument

I. The controlling principles of law constrain against disestablishment of an Indian reservation.

The law is established that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." United States v. Celestine, 215 U.S. 278, 285 (1909), most recently quoted with approval in Mattz v. Arnett, ___ U.S. ____, 37 L.ed.2d 92, 106 (1973). "A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." Mattz v. Arnett, ubi supra. This Court recently has twice defined the principles and guidelines governing the determination of whether an act of Congress destroyed or dissolved or terminated the reservation status. City of New Town, North Dakota v. United States, 454 F.2d 121, 125 (C.A. 8, 1972); United States ex rel. Feather v. Erickson, 489 F.2d 99, 101 (C.A. 8, 1973), petition for a writ of certiorari filed April 8, 1974 (42 U.S.L.W. 3595).

One of the effects of disestablishing the reservation is to destroy its status as Indian country as defined in 18 U.S.C. 1151, to eliminate tribal and Federal jurisdiction, to subject the Indians to the loss of Federal and tribal benefits available only to reservation Indians, and to expose the Indian people to state laws, state taxes, state police, state courts and state officials. Unfortunately, attitudes of hostility and discrimination were in full flow when the three Rosebud statutes were enacted. Indeed, these attitudes evoked expressions of judicial concern for the Nation's tribal wards, such as are found in United States v. Kagama, 118 U.S. 375, 383-384 (1886), and similar cases.

The effect of disestablishment and the nature of the controlling guidelines make clear that these are not cases where the court will strain to terminate reservation status. The search should not be for the remote, or the stretch for the obtuse. Even where the question is close, and here it is not, "a holding favoring federal jurisdiction is required unless Congress has expressly or by clear implication diminished the boundaries of the reservation opened to settlement". (emphasis in original.) United States v. Erickson, 478 F.2d 684, 689 (C.A. 8, 1973) quoted with approval in Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92, 106, n. 23 (1973). Guided by these principles, we turn to the issue of whether any of the three Rosebud "surplus land" statutes express a Congressional determination to terminate. Resolution of that issue calls for examination of the purposes and language of the statutes, their history and background.

II. The three Rosebud statutes did not disestablish any part of the Rosebud reservation.

A. The purpose of the statutes did not require alteration of the reservation boundaries. The prime purpose of the three statutes was to make reservation land available for settlement and in this fashion carry out the Federal policy of planting among the Indians the "civilizing" influence of the white man. The statutes were designed to bring to the allottees among whom the homesteaders would settle, the opportunity to learn from their white neighbors how to be farmers and stockmen. See Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92, 101-102 (1973).

Thus, with reference to the bill that became the 1904 Act without the Indians' consent, the House Committee on Indian Affairs reported that opening the Gregory county lands to settlement "will enhance very materially the value of the 452 Indian allotments which are within the area proposed to be ceded, and it will also bring the Indians into contact with their white brothers, and give them the benefit of learning how to farm and raise stock from actual observation, and it will tend to make them more self supporting ***." H. Rept. 443, 58th Cong., 2d sess., p. 3 (January 21, 1904). (App. II, Doc. 14.)[15/] The Senate Committee on Indian Affairs, adopted as its report the House report. S. Rept. 651, 58th Cong., 2d sess. (February 4, 1904), reprinted in full in 38 Cong. Rec. 4985-88, April 18, 1904. (App. II, Doc. 16.)

15/ Similar language is found in 45 Cong. Rec. 5457 (April 27, 1910), (App. III, Doc. 33), quoted in the opinion below, App. I, op. 66.)

As in Seymour v. Superintendent, 368 U.S. 351, 356 (1962), the Rosebud statutes "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."

Thus we see, that to accomplish the objective of the three Rosebud acts, it was not necessary to destroy the reservation status, or to alter the boundaries, delimiting "a permanent reservation" solemnly secured to the Indians by the 1868 Treaty for their "absolute and undisturbed use and occupation."

The district court did not adopt this view of statutory construction.

B. The language of the three statutes rejects disestablishment of any part of the reservation. The construction of the Rosebud statutes is controlled by "the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). Also, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Peoria Tribe v. United States, 390 U.S. 468, 472-473 (1968); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 354 (1941); United States v. Celestine, 215 U.S. 278, 290 (1909).

The canons of construction are but tools to carry out the predicate of the Supreme Court decisions, that the duties owed by the United States to Indian tribes with which it deals are to "be judged by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 297. "These Indian tribes are the wards of the Nation." United States v. Kagama, 118 U.S. 375, 383. (Emphasis in original.) "*** the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness." United States v. Payne, 264 U.S. 446, 448. "The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws." Choctaw Nation v. United States, 119 U.S. 1, 28 (1886). (emphasis in original.)

These broad and humane principles invoke the highest standards of honor and morality fitting to the situation where the guardian deals for the land of its unprotected and trusting ward. They take on double significance, where, as here, the United States represents conflicting interests -- the fiduciary relationship of the voteless Indian whose land it held in trust, versus the non-Indian citizens who demanded the reservation lands for settlement. "That no man can serve two masters is gospel as well as law. There can be no halfway ground. ***." Ottawa Tribe v. United States, 166 Ct. Cl. 373, 379 (1964), certiorari denied 379 U.S. 929. In the context of these precepts we examine the language and administrative construction of the three Rosebud statutes.

1. There is no language of disestablishment. As pointed out by the Supreme Court "Congress has used clear language of express termination when that result is desired." Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92, 106, fn. 22 (1973), listing examples. Nothing on the face of the three Rosebud statutes expressly disestablishes any part of the reservation, or purports to alter the reservation boundaries. Not one word in any of the three statutes expresses the clear intent essential to ascribe to Congress the intent to wipe out the reservation status and leave hundreds of Indians residing in the affected areas outside of the reservation and subject to the jurisdiction of the State. Indeed, there are no controlling language differences between the three Rosebud statutes and the statutes adjudicated not to have disestablished the reservations they affected. Seymour v. Superintendent, 368 U.S. 351 (1962); City of New Town, North Dakota v. United States, 454 F.2d 121 (C.A. 8, 1972); United States v. Erickson, 478 F.2d 684 (C.A. 8, 1973).

a. The language of the three Rosebud acts. The substance of all three statutes is the same. All three, without the consent of the Indians, unilaterally directed the disposal of the land with the United States acting as trustee to sell the land and credit the proceeds to the Tribe. Only the format, but not the substance, of the 1904 Act differs from the 1907 and 1910 Acts. The portion of the opening section of the 1904 Act preceding the enactment clause, sets out pro haec verba the six articles of the unratified agreement of September 14, 1901 to sell 416,000 acres of Gregory county land for $1,040,000. It is followed by the

Congressional version of the same agreement as unilaterally amended, including omission of the sixth article which called for ratification by Congress. (See page 7, supra.) The format was a camouflage, -- a pretense to give the statute the face of an agreed transaction. In fact, all three statutes simply directed the Secretary to open the land for settlement and credit the proceeds to the Tribe, after first granting the school sections to the State and making minor reservations. (See p. 34, infra.)

(1) The United States not a purchaser. All three statutes affirmatively spelled out that except for the school lands, the United States was not buying the land or guaranteeing to find purchasers, but was simply acting "as trustee for said Indians to dispose of said lands to expend and pay over the proceeds received from the sale thereof only as received ***." (1904 -- sec. 6; 1907 -- sec. 8; 1910 -- sec. 11.) The district court did not discuss or attempt to reconcile its conclusion of disestablishment with the Government's disavowal of purchase.

(2) Deposit of proceeds to the Tribe's credit. All three statutes directed that the proceeds of disposal be deposited in the Treasury to the credit of the Indians belonging and having tribal rights on the Rosebud reservation. (1904 -- sec. 3; 1907 -- sec. 5; 1910 -- sec. 7.) If the trial court is right and each statute terminated a portion of the reservation, the Indians in the disestablished portion would not share in the benefits of those moneys since they would no longer be "Indians belonging to and having tribal rights on the Rosebud Reservation."

While the district court was aware that this was the effect of its holding, it considered that such was the Congressional intent. (App. I, op. 71.) The district court makes no reference to the statutory mandate that the proceeds of disposal be credited to the Tribe, although the Supreme Court cases holding that surplus land statutes do not extinguish title rest on this feature. (The Supreme Court decisions are discussed at pages 36-40, infra.)

(3) Treaty benefits. All three statutes specified "that nothing in this agreement [Act] shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement." (1904 -- sec. 1, Art. 5; 1907 and 1910 Acts -- last proviso.)

One of the treaty benefits was the right to a defined reservation. That right was initiated in Article 2 of the Treaty of April 29, 1868, supra, establishing the Great Sioux Reservation, "for the absolute and undisturbed use and occupation of the Indians ***" from which the 1889 Act carved Rosebud "for a permanent reservation". Section 2 of the 1889 Act resecured to the Rosebud Indians "all the title and interest of every name and nature secured" by the Treaty of 1868. We see then that each of the three statutes expressly preserved to the Rosebud Tribe its right to the reservation as defined, secured, and resecured in the 1868 Treaty and 1889 Act.

Contemporaneous with the 1904 Act, the estimated 500 Indians with 452 allotments in the Gregory county portion of the reservation were "Indians of the Rosebud Reservation" protected by the treaty benefit language set out in the

last article of section 1 of the 1904 Act. Similarly, the 500 Indians and 2600 allottees in the Tripp county portion of the reservation, and the 1400 Indians and 4230 allottees in the Mellette county portion of the reservation, were correspondingly protected by the same language in the last proviso of the 1907 and 1910 Acts.[16/]

The treaty benefit language precludes the notion that Congress, at one and the same time, renewed treaty promises to maintain the reservation, and altered the reservation boundaries so as to strip the reservation Indians of their Federal and tribal rights to be free of State jurisdiction. To disestablish or dissolve the reservation status is to read the benefit provisions out of the three statutes.

Although the identical treaty benefit language was deemed significant by this Court in City of New Town, North Dakota v. United States, 454 F.2d 121, (C.A. 8, 1972), the court below made no reference to that language in its opinion. In New Town this Court pointed out that a Congressional intent to abrogate treaty rights is not to be lightly imputed to Congress; that the right to a reservation was preserved,there by an 1886 agreement, here by the 1868 Treaty and the 1889 Act; and that the right to have the reservation boundaries remain undiminished is specifically recognized by the treaty benefit provisions of the three Rosebud acts just as it was in the Fort Berthold 1910 Act.

16/ The number of allotments and the Indian population by counties are based on a 1913 report by the Superintendant, Rosebud Indian Agency. (App. IV, Doc. 42.) No comparable figures were found for earlier dates.

(4) Reservation of land for Indian purposes. The 1904 Act (sec. 2) and the 1910 Act (sec. 1) authorized the reservation of land for agency (sub-issue station), Indian school and religious purposes. This is consistent with leaving the reservation boundaries untouched. On the other hand, terminating the reservation status and setting land aside for future use for agencies to serve the Indians, for Indian school and for missions, all for the benefit of the resident Indians, cannot be reconciled with termination of reservation status.

(5) Townsites. The 1904 Act did not provide for townsites, again probably because it originated as an outright cession under which townsites would be provided under the public land laws. Act of March 3, 1863, c. 80, sec. 1, 12 Stat. 754, and Act of March 3, 1877, c. 113, 19 Stat. 392. Section 4 of the 1907 Act authorized the Secretary to reserve land for townsite purposes with the net proceeds from the sale of such lands to be paid to the Indians.

Section 3 of the 1910 Act authorized the Secretary to reserve land for townsite purposes, to set apart and patent to the municipality up to 10 acres in each townsite for school, park and other public purposes, and to pay 20% of the proceeds from the sale of town lots for the construction of school houses or other public buildings or in improvements in the townsites and to credit the Indians with the balance. The contribution of 20% of the Indians' money to pay for public structures in towns and the donation of tribal land for schools, parks and other purposes can be rationalized only if the Indians were to share in the benefits as residents of the reservation. Any other view would charge Congress with an intent to defraud -- an interpretation to be avoided. The opinion below makes no reference to this gratuity feature of the townsite provisions.

(6) Reservation of timber land. The 1904 and 1907 Acts fixed arbitrary prices for the lands. The 1910 Act (sec. 4) called for classification and appraisal before disposal and reserved to the Tribe the land classified as timber. If, as held below, that portion of the reservation were being wiped out and Indian title extinguished, why reserve timber lands to the Tribe? Why leave the Tribe with vested interests? The opinion below is silent of the point.

(7) Allotments. The 1907 Act (sec. 2) conferred on Indians living in the affected area (Tripp county) the option of relinquishing their allotments and selecting allotments "anywhere within said reservation", and in addition, directed the Secretary to grant an allotment to each eligible unallotted child. The 1910 Act (sec. 1) granted to Indian allottees the option to relinquish their allotments within the affected area (Mellette county) and select lieu allotments "on the diminished reservation". Section 2 directed that before the lands were opened "the allotments within the portion of the said Rosebud Reservation to be disposed of as herein prescribed shall have been completed." The 1904 Act contained no allotment provisions doubtless because it originated as an outright cession. (See p. 7, supra.) The district court's reliance on the allotment provisions, as supporting its conclusion of disestablishment is discussed at pages 23-29, infra.

(8) The school land grant. All three statutes granted the school sections or equivalent lands to the State for which the United States was to pay $2.50 per acre. (1904 -- sec. 4; 1907 -- sec. 6; 1910 -- sec. 8.) (The district court's reliance on the school land provisions is discussed at pages 30-31 infra.

(9) Liquor laws. Section 10 of the 1910 Act made the liquor laws of the United States applicable to all land, Indian and nonIndian, in the affected area for a period of 25 years, -- the term of the trust patents issued to the allottees. To the district court this liquor provisions was clear indication of the Congressional intent that "this was not to be considered henceforth Indian land." (App. I, op. 67.) We deal further with the district court's views on the liquor laws at pages 31-33, infra.

2. The district court misconstrued the allotment, school land, and intoxicant provisions of the three statutes. In support of its judgment of disestablishment the district court placed primary reliance on its reading and construction of the allotment, school land and intoxicant provisions of the three Rosebud statutes. (App. I, op. 43-46, 54-58, 66-72.) In all three instances the court's analysis and conclusions are erroneous.

a. The allotment provisions of the 1907 and 1910 Acts. The district court quoted in part from Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92, 106 (1973) where the Supreme Court observed: "A second conclusion is also inescapable. The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was terminated." (App. I, op. 56.)[17/] Although, elsewhere the court subscribed to the proposition that each congressional act and treaty is different and must be so examined (App. I, op. 49-50), it undertook to distinguish the Rosebud allotment provisions from those in Mattz. (App. I, op. 56-58, 70-71.)

17/ To this the district court might have added the Supreme Court's statement (idem, p. 102): "Rather, allotment under the 1892 Act is completely consistent with continued reservation status."

In the first place, when dealing with Indian statutes, substance, not form controls. Courts do not play with differences in provisions among statutes relating to different tribes, where such differences are compelled by circumstances present in one case and not the other. In Mattz and this case, the underlying policy expressed by the General Allotment Act of 1887 was the same -- continue the reservation system and the trust status. Allot tracts to individual Indians. Make unallotted lands available to nonIndians "with the purpose, in part, of promoting interaction between the races of encouraging Indians to adopt white ways." (Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92, 101-102 (1973). When all the lands had been allotted and the trust period expired, the reservation could be abolished.[18/]

In the second place, in Mattz, there was legislative hostility to allotments and to the reservation. (37 L.ed.2d 103-105.) It was "against this background of repeated legislative efforts to terminate the reservation, and to avoid allotting reservation lands to the Indians, that the 1892 Act was introduced." (Idem, p. 105.) Prior to the 1892 Act in Mattz there had been no recognized reservation. There had been no allotments. Not even the sites of Indian villages and settlements were protected. This accounts for the Mattz allotment language allowing one year for allotments and protecting the sites of Indian villages and settlement. This is the language that the court below ruled distinguishes Mattz, pointing out that the Rosebud Acts did not have a comparable one year allotment provision. (App. I, op. 57-58; 70.)

18/ Congress extended the trust period for individual allotments at Rosebud by the Indian Reorganization Act of June 18, 1934, c. 576, 48 Stat. 984 (25 U.S.C. 462).

Of course, no comparable language is in the Rosebud statutes. Allotments had been underway on the Rosebud reservation since the 1889 Act. There was no occasion to allow a year, as in the case of Mattz where the Indians had never been allotted. There was no occasion to reserve title to Indian villages. All the land embraced in the entire Rosebud reservation had been confirmed to the Sioux since the 1851 Treaty of Fort Laramie, reconfirmed in the 1868 Treaty, and segregated and reconfirmed for the Rosebud in the 1889 Act. This points up the validity of the rule that language in one Indian statute cannot control the intent of Congress in a different statute dealing with another tribe and another fact situation.

In the third place, in drawing its parallel with Mattz, the district court incorrectly read the allotment language of the Rosebud 1907 Act and misconstrued the language of the Rosebud 1910 Act.

(1) The district court incorrectly read the allotment language of Section 2 of the 1907 Act. Referring to the allotment provisions of the 1907 Act, the district court confined itself to the relinquishment language (App. I, op. 56-57), and concluded that the "clear import of that section is that the Indians in the portion soon to be opened, were allowed to relinquish that part of the reservation and remove to the diminished portion of the reservation." (App. I, op. 57.) This view will not withstand analysis.

The relinquishment language is plain. No matter where an allotment was on the reservation, the allottee could exchange for an allotment "anywhere within

said reservation", including the Tripp county portion. This was explicitly spelled out in the reports to both the House and the Senate, explaining as follows:

> "The bill further provides that before proclamation of the President, declaring the land open for settlement, the Indians within the reservation may relinquish allotments and select allotments in any other portion of the reservation, including the tract affected by this bill [Tripp county]. The purpose of this is to provide an opportunity for the Indians to relinquish worthless lands that they may have selected heretofore, and take better or more desirable lands in lieu thereof." 19/

H. Rept. 7613, 59th Cong., 2d sess., p. 3 (1907), adopted in toto in S. Rept. 6838, 59th Cong., 2d sess. (1907). (App. III, Docs. 21, 23, see p. 22, supra.) The trial court's construction is in direct conflict with the plain language of the 1907 Act and the committee reports.

The same sentence relating to relinquishment construed by the trial court directed that 160 acre allotments be granted to each eligible Indian child. (See p. 22, supra.) We have no 1907 figures, but in 1913 there were about 500 Indians and about 2600 allotments in the Tripp county portion of the reservation. (See pp. 19-20, fn. 16, supra.) Although sections 8-11 of the 1889 Act provided continuing authority to allot within the Rosebud Reservation, apparently an administrative delay had resulted in a backlog of some 600 or 700 Indians on the reservation who were without allotments. The Indians had complained about this at the council proceedings. (Council proceedings, January 18, 1907, p. 14.) (App. III, Doc. 19.) It was in response to that complaint that Congress in the 1907 Act directed the Secretary of the Interior to issue allotments to the unallotted, eligible children.

19/ Emphasis supplied throughout this brief unless otherwise indicated.

Such allotments could be made anywhere on the reservation, including Tripp county, affected by the 1907 Act, up to the date that the President proclaimed the lands open. Had Congress intended to dissolve the reservation status of the Tripp county portion of the reservation, it hardly would have provided for 160 acre allotments anywhere on the reservation, including Tripp county.

(2) The district court omitted part and incorrectly construed the remainder of the allotment language in the 1910 Act. Section 1 of the 1910 Act offered allottees on the affected portion of the reservation (Mellette county), the option to relinquish their allotments before the lands were offered for sale and to select lieu allotments "on the diminished reservation". The district court considered this allotment provision to be "the strongest indication yet that the area in question was no longer to be considered 'Indian land'." (App. I, op. 71.) The court viewed the option provision as a Congressional offer to allow Indians to move out of Mellette county "to exchange and take their allotments in what would continue to be Indian land so that they might continue to benefit from all of the programs that the government had on the reservation." (Idem, op. 71.)

About the time of the Act of May 30, 1910, there were at least 1400 Indians and in excess of 4200 allotments in Mellette county. Indian Population in United States and Alaska 1910, (GPO 1915); letter dated April 26, 1913, Superintendent to Commissioner of Indian Affairs (App. IV, Doc.42). The President opened the land for settlement thirteen months later, on June 29, 1911 (40 L.D. 164). The

district court construed the statute to mean that Congress was telling some 1400 resident Indians that if they wanted to remain reservation Indians and receive the benefits of Government programs, they had 13 months in which to relinquish their homes of perhaps 20 years standing in Mellette county, surrender their improvements to the land, uproot their families and community ties, and remove themselves and their belongings to whatever allotments could be found in the picked-over remainder of what constituted the trial court's "reservation" at that time -- i.e., Todd county.

Fortunately, the facts do not compel so insensitive a result. The word "diminished", as used in the 1910 Act must be delegated its place in the total context. The expression "diminished reservation", as well as the stronger expression "restored to the public domain", appear in the Act of May 29, 1908, 35 Stat. 460, a surplus land statute affecting both the Cheyenne River and Standing Rock reservations, two of the six Sioux reservations segregated under the 1889 Act (page 6, fn. 8, supra). The two expressions were advanced as proof of the Congressional intent to dissolve the Cheyenne River reservation. This Court rejected the contentions in United States v. Erickson, 478 F.2d 684, 687-688 (C.A. 8, 1973). There is no occasion here to discuss the phrase "restored to the public domain" because it does not appear in any of the Rosebud statutes. As to "diminished" this Court pointed out that the reservation may be "diminished in land size *** without changing the reservation boundaries (idem, p. 687). The court below made no reference to Erickson in reaching its conclusion with respect to the word "diminished".

"Diminished" also may have been used as a shorthand term of identification. Compare Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92 where the statute directed that all of the surplus lands embraced in "what was the Klamath River Reservation" be opened under the public land laws. The Supreme Court stated (p. 102) that the reference to the reservation in the past tense "is not to be read as a clear indication of congressional purpose to terminate", but seems (p. 103) "merely to have been a natural, convenient, and shorthand way of identifying the land subject to allotment under the 1892 Act. We do not believe the reference can be read as indicating any clear purpose to terminate the reservation directly or by innuendo."

Finally, the district court omitted all reference to the provision of Section 2 of the 1910 Act directing that all allotments within Mellette county be completed before the land was opened. That provision was construed by the Bureau of Indian Affairs to provide "for allotments in the opened territory to every man, woman, and child who has not heretofore received an allotment; ***." Letter dated November 12, 1910, Assistant CIA. (App. IV, Doc. 40B.) Thus, according to the district court, when Congress authorized fresh allotments in Mellette county, it at the same time intended to dissolve that portion of the reservation because it required Indians who wanted to give up their allotments, to take lieu allotments outside of Mellette county.

Thus, the foundation falls away from the trial court's conclusion of disestablishment resting on the allotment provisions. What the district court conceived to be evidence of an intent to dissolve the reservation status, in fact reaffirms the intent to preserve the reservation status.

b. The school land grants. Each of the three Rosebud statutes granted sections 16 and 36, or equivalent land, to the State for school purposes. The district court considered these grants as strong evidence of an intent to wipe out the reservation status. (App. I, op. 43-46; 54-56; 66-67.) The court pointed to South Dakota's Enabling Act specifying that lands in "Indian, military or other reservations" were not available to satisfy the Federal school grant until "the reservation shall have been extinguished and such lands be restored to *** the public domain."[20/] (Idem, op. 43.) The district court inversly reasoned that by the 1904 Act, title to the tribal land must have been "extinguished and the lands restored to the public domain" because otherwise under the language of the enabling act the school grant would not apply. (App. I, op. 44.)

The court was in error. The reverse is true. The sections 16 and 36 within the Rosebud reservation were never public land. Title was not extinguished. The reservation was not disestablished. (See cases discussed at pages 36-40.) If the explicit grant of the school lands had not been written into each of the Rosebud statutes, the school sections would have remained Indian land. Minnesota learned this when it undertook to satisfy its school grant out of Chippewa reservation lands affected by a surplus land statute substantively the same as the Rosebud statutes. Minnesota v. Hitchcock, 185 U.S. 373 (1902).

20/ This provision is not unique. It appears in the Enabling Acts of North Dakota involved in the Fort Berthold statute, which this Court held did not disestablish the reservation. City of New Town, North Dakota v. United States, 454 F.2d 121 (C.A. 8, 1972). It also appears in the Enabling Act of the State of Washington involved in the case of Seymour v. Superintendent, 368 U.S. 351 (1962).

Again the district court's position that the school land provisions demonstrated disestablishment of the reservation is left without foundation.

c. Intoxicant provisions. Section 10 of the 1910 Act subjects all lands in Mellette county, trust and fee, to the Indian liquor laws for 25 years. Before the 1910 Act, all land in Mellette county was in trust status and therefore Indian country subject to the liquor laws. Section 10 was designed to place those lands in the same position with respect to the Indian liquor laws as they were before the 1910 Act. The district court treated this provision almost as if it were proof positive that Congress intended to eliminate the reservation status of Mellette county. (App. I, op. 67-70.)

In 1910 it was a crime to sell liquor to an Indian ward anywhere in the United States, and it was a crime to introduce intoxicants into "Indian country". (Act of January 30, 1897, c. 109, 29 Stat. 506.) Prior to the 1948 statutory definition of "Indian country" (18 U.S.C. 1151), and at the time of the 1910 Act, the Federal cases defined "Indian country" as used in the 1897 Act to mean land to which the Indian title had not been extinguished. Clairmont v. United States, 225 U.S. 551, 557-559 (1912); Dick v. United States, 208 U.S. 340, 359 (1908); United States v. Bris, 121 U.S. 278, 280 (1887); Bates v. Clark, 95 U.S. 204, 207-208 (1877); including trust allotments, United States v. Pelican, 232 U.S. 442, 449-450 (1914); United States v. Erickson, 478 F.2d 684, 688 (C.A. 8, 1973). In addition, under a Supreme Court decision in effect during the interval 1905 to 1911, the law was that once an Indian received a trust allotment he

became a citizen free of the Indian liquor laws. Matter of Heff, 197 U.S. 488 (1905), ignored in Hallowell v. United States, 221 U.S. 317 (1911) and expressly overruled by United States v. Nice, 241 U.S. 591 (1916); Cohen, Felix S., Handbook of Federal Indian Law, p. 157 (GPO 1945).

The district court was aware that the Indian liquor laws extended to Indian country but erroneously assumed that land held by homesteaders under the 1910 Act, also was Indian country. Based on this erroneous assumption, the court mistakenly reasoned that if Congress had intended to leave the reservation status unaltered, there would have been no need explicitly to extend the liquor laws to all land in Tripp county for 25 years, the period of trust allotment. Rather, the court thought this was a "buffer" area.[21] (App. I, op. 67-70.)

If Section 10 had been omitted, under the law in force in 1910, it would have been lawful to introduce intoxicants onto the fee land interspersed among the allotments, and during the period 1905-1911, it would have been lawful to sell liquor to Indians in Mellette county so long as they were off of trust land.

21/ The court's suggestion that section 10 of the 1910 Act created a "buffer" area has no rational basis. (App. I, op. 68.) Buffer areas were carved out of public land, adjoining Indian country in order to prevent the sale of liquor along the boundaries of the land retained by the Indians. Felix S. Cohen, Handbook of Federal Indian Law, p. 353 (GPO 1945). A good example is found in Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942), where public land surrounding the reservation on the east and north was withdrawn to control the liquor traffic. First, the 1910 Act was not a cession, did not convert Mellette county into public land, and could not be a buffer area. (See pp. 36-40, infra.) Second, it is a misnomer to call an intermixed area of trust and fee land a "buffer" area. A glance at the map makes apparent that Mellette county could not be a buffer for Todd or Tripp counties. The idea of a "buffer" area originated with the court below. No mention of it appears in the legislative materials.

Section 10 conferred the same protection that existed before the 1910 Act was enacted. It insured that liquor could not be sold to anyone, anywhere in Mellette county for the 25-year period of the trust patent, Matter of Heff, supra, to the contrary notwithstanding. Section 10 enlarged, it did not diminish, the protection attaching to the reservation. Section 10 should have led the court below to the opposite conclusion.

C. None of the three Rosebud statutes extinguished Indian title to any of the surplus land affected by those statutes. There is a critical difference between an outright sale by a tribe to the United States and the United States acting as trustee to dispose of tribal land with the proceeds to be credited to the tribe.[22] Where a tribe sells and the United States buys all tribal interests, nothing is left in the tribe. There is an absolute conveyance. Title to the ceded land is extinguished. The interest of the tribe is finally and completely ended. Examples of this class, mostly before 1880, are numerous. (See Cohen, Handbook of Federal Indian Law, (GPO 1945), pp. 334, fn. 521; 294, fn. 64; Federal Indian Law, supra, (GPO 1958), p. 602, fn. 6.)

1. None of the three Rosebud statutes is an outright cession and sale. Tribal title to the affected land was not extinguished. The last section of each of the three acts affirmatively spells out that the United States was not buying the surplus land or guaranteeing to find buyers, but was simply acting as trustee

22/ The late Felix S. Cohen, "an acknowledged expert in Indian law" (Squire v. Capoeman, 351 U.S. 1, 8-9) discusses the two classes. Cohen, Felix S., Handbook of Federal Indian Law, pp. 334-336 (GPO 1945); Federal Indian Law, pp. 710-717 (GPO 1958).

to dispose of the land and pay over the proceeds to the Indians. (See p. 18, supra.) The beneficial title remained in the Tribe until the entryman paid the purchase price and earned his patent. Ash Sheep Co. v. United States, 252 U.S. 159 (1920); United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498 (1913); Minnesota v. Hitchcock, 185 U.S. 373, 393-395 (1902); United States v. Brindle, 110 U.S. 688, 693 (1884); Hanson v. United States, 153 F.2d 162, 163 (C.A. 10, 1946); Confederated Bands of Ute Indians v. United States, 100 Ct. Cl. 413, 432 (1943).

The 1907 and 1910 Acts contain no words of cession or sale, but simply direct the Secretary to dispose of the land and credit the proceeds to the Tribe. Nor do the substantive provisions of the 1904 Act use words of cession or sale. Section 1 of the 1904 Act incorporates pro haec verba the unratified 1901 agreement with its broad words of conveyance ("do hereby cede, surrender, grant, and convey to the United States all their claim, right, title and interest ***"). But that was only dressing, a front, to give the bill the face of an agreed cession. Even if the Indians had consented to the 1904 Act, and they did not, such language of cession alone, does not determine whether the Government became a trustee or acquired unfettered title. Indeed, even where the title of a tribe is concluded by an outright sale and purchase, this Court has held that the extinguishment of title does not necessarily support the implication that the reservation is disestablished. United States ex rel. Feather v. Erickson, 489 F.2d 99 (C.A. 8, 1973), petition for a writ of certiorari filed April 8, 1974 (42 U.S.L.W. 3595).

The fundamental error below was that the court perceived no difference between an outright sale and the United States acting as trustee to sell the Tribe's land. The court thought that the 1904 Act simply reflected "a change in an appropriations matter and not a change in any substantive effect ***." (App. I, op. 39-40.) In pursuit of that theme, the district court regarded the 1904 Act as if it were an outright cession that extinguished tribal title, vested complete ownership in the United States, placed the land in the public domain and "did away" with the reservation. The court derived these conclusions, all erroneous, from the history of 1902 bills to ratify the September 14, 1901 agreement to sell the Gregory county land for $1,040,000 -- bills that were never reached for vote -- as if that were the legislative history of the 1904 Act. (App. I, op. 36-40, 42, 44.) Even though the 1907 and 1910 Acts contain no comparable camouflage language of sale and cession, the trial court treated those acts as if infected with the court's version of the legislative history of the rejected bills erroneously ascribed to the 1904 Act.

In this fashion the decision below reached the premise that no controlling distinction exists between a voluntary sale and purchase and the involuntary arrangements reflected in the Rosebud "surplus" land statutes; that one as much as the other made the United States the owner; and, that, consequently the Rosebud statutes extinguished the title, placed the land in the public domain and disestablished the affected portions of the reservation. Thus the court repeatedly concluded that Congress intended "to do way with" the 75% of the Rosebud

reservation within the four counties,[23] to restore the unallotted land "to the public domain",[24] to extinguish "the title of the Indians",[25] "to return the counties to the public domain and to extinguish the reservation or 'Indian land' nature of those counties".[26] But for this faulty premise, the court below might have reached a correct judgment.

2. The case law establishes that the United States took as trustee, not as owner. Even if the three statutes had contained broad words of cession, that would have made no difference. So long as the United States acted as trustee to dispose of the land and credit the proceeds to the Tribe, Indian title was not extinguished. Decisions of the Supreme Court provide a number of good examples. In United States v. Brindle, 110 U.S. 688 (1884), the tribes, by an 1854 Treaty, did "cede, relinquish, and quit-claim *** all their right, title, and interest". The United States agreed to dispose of the land and pay the proceeds over to the tribes.[27] Brindle was a federal land receiver entitled to receive a

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23/ e.g., App. I, op. 43, 49, 78.

24/ e.g., App. I, op. 44, 46. "Restore" is not strictly accurate, since the land never had been in the public domain.

25/ e.g., App. I, op. 44, 48, 54, 56, 60, 61, 75.

26/ e.g., App. I, op. 75.

27/ Apparently the parties and the court below were under the impression that the trust formula had its origin in the 1904 Rosebud act. As shown by Brindle, the formula was used in 1854 and there are others before 1904. The court refers to the "new policy" (App. I, op. 35, 39-40). Cohen dates the practice as commencing in the 1880's. Handbook of Federal Indian Law, pp. 334-336 (GPO 1945).

maximum of $2,500 in commissions from the sale of public lands. He sued for the excess above $2,500 on the ground that the 1854 Treaty lands were not public lands. The Supreme Court agreed stating (110 U.S. 693):

> *** The cessions to the United States were in trust, to survey, manage and sell the lands and pay the net proceeds to or invest them for the Indians. There was never a time that the United States occupied any other position under the cessions than that of trustees, with power to sell for the benefit of the Indians. In equity, under the operation of the Treaties, the Indians continued, until sales were made, the beneficial owners of all their country ceded in trust. Of this we have no doubt. ***.

In Minnesota v. Hitchcock, 185 U.S. 373 (1902), an 1889 Act, enacted before the district court's "new policy" (Act of January 14, 1889, c. 24, sec. 1, 25 Stat. 642), provided "for the complete cession and relinquishment in writing of all their title and interest" and specified that "acceptance and approval of such cession and relinquishment *** shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided."

The State of Minnesota claimed under its grant of sections 16 and 36 in every township of "public land". The Supreme Court held that public lands were lands subject to sale or other disposal under the public land laws, that the Indian land was not public and denied Minnesota's claim, stating, 185 U.S. at pp. 394-395:

> *** The cession was not to the United States absolutely, but in trust. *** The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds *** to the credit of the Indians ***.

Also, United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498 (1913).

Four days after the Rosebud Act of April 23, 1904 was approved a similar statute was enacted for the Crow Tribe. Act of April 27, 1904, c. 1624, 33 Stat. 352. The language of conveyance was "cede, grant, and relinquish to the United States all right, title, and interest". A livestock company, enjoined from running sheep on Indian lands, defended on the ground the lands were public because the words of conveyance vested the United States with perfect title. Ash Sheep Co. v. United States, 252 U.S. 159 (1920). The Supreme Court rejected this argument, and made plain that it was the purpose of the statute, not the language of conveyance, that controlled, stating (p. 166):

> Taking all of the provisions of the agreement together, we cannot doubt that while the Indians by the agreement released their possessory right to the government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made, any benefits which might be derived from the use of the lands would belong to the beneficiaries, and not to the trustee, and that they did not become 'public lands' in the sense of being subject to sale or other disposition, under the General Land Laws.

An extreme example is found in the Act of June 15, 1880, c. 223, 21 Stat. 199. Section 3 of that Act specified that "all lands not so allotted, the title to which is, by said agreement *** released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of public lands, at the same price and on the same terms as other lands of like character ***." Despite this unmistakeably clear and comprehensive language, the Solicitor of the Department

of the Interior held that the Utes retained beneficial ownership. Restoration to Tribal Ownership of Ceded Colorado Ute Indian Land, 56 I.D. 330 (1938). The Solicitor stated (56 I.D. at pp. 337-338):

> *** The significant legal effect of these [surplus land] cessions is that the United States becomes a trustee for the disposal of the land ceded. Regardless of the particular language of the cession, the result is that the Indians retain an equitable interest in the land until they have received the consideration bargained for, and the United States becomes a 'trustee in possession'.

The Solicitor was confirmed in his views by the Court of Claims in Confederated Bands of Ute Indians v. United States, 100 Ct. Cl. 413, 432 (1943).

Thirty-three examples embraced in 25 separate statutes are listed in the opinion and order approved by the Secretary of the Interior in 1935, temporarily withdrawing surplus lands from disposal under authority of the Indian Reorganization Act, authorizing the Secretary "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened ***." Act of June 18, 1934, c. 576, sec. 3, 48 Stat. 984; 54 I.D. 559, 561-562, 564. And the surplus lands under the three Rosebud statutes were specifically withdrawn and restored to the Tribe. (54 I.D. 562.)

The decision below does not address itself to the principle of law established by Brindle, Hitchcock, Ash Sheep Co., and like cases discussed above. The district court does mention Ash Sheep Co., but disposes of it with the gloss that the 1904 Crow statute "contains several provisions which the [Rosebud] 1904

Act does not." (App. I, op. 49.) The court points to no controlling differences between the Rosebud statutes and those in the adjudicated cases, and we are aware of none. More important, the court below failed to recognize the significance of Ash Sheep Co., -- namely, that regardless of language, if the United States acts as trustee to dispose of the land, the statute does not extinguish the title. It remains in the tribe until the entryman pays the purchase price and does all things necessary to earn the right to a patent.

In the Tribe's view, this line of cases exemplified by Brindle and Ash Sheep Co., removes the underpinning of extinguishment on which the decision below depends.

D. The history of the three Rosebud statutes denies a Congressional intent to disestablish any part of the reservation.

1. Unratified cession and sale. In 1901 Congress empowered the Secretary of the Interior to negotiate agreements for the cession of "surplus or unallotted lands". Act of March 3, 1901, c. 832, 31 Stat. 1058, 1077.[28] That same year the Secretary dispatched Inspector McLaughlin to Rosebud to negotiate an agreement "for the cession of that portion of the Rosebud reserve embraced in Gregory county." Letter dated March 19, 1901, pp. 1, 2. (App. II, Doc. 2.) Among other things, the Inspector was advised that the "proposition for

28/ An earlier bill to accomplish this for Gregory county failed. H. Rept. 486, 56th Cong., 1st sess. (1900). (App. II, Doc. 1.)

the cession" did not come from the Indians and was cautioned that any agreement must be executed and signed by at least three-fourths of the male adults as required by Article 12 of the 1868 Treaty. (Idem, pp. 6, 7.)

When McLaughlin came upon the reservation in the spring of 1901, there were about 4917 Sioux living on the reservation. (App. II, Doc. 3, p. 17.) Some 4508 allotments had been made reservation wide pursuant to the 1889 Act (p. 7, supra). Of these, about 452 allotments were in the Gregory county portion of the reservation. Sen. Doc. 31, 57th Cong., 1st sess., p. 6 (1901). (App. II, Doc. 3.)

In September 1901 McLaughlin negotiated an outright sale and purchase of the unallotted land in Gregory county, about 416,000 acres for $1,040,000, or $2.50 per acre. (Idem, p. 6.)[29] McLaughlin prepared an agreement dated September 14, 1901, consisting of six articles reciting that the Rosebud Indians

29/ McLaughlin reported that the "land in Gregory County is without doubt the best and most desirable portion of the Rosebud Reservation ***." (Idem, p. 6.) That the Indians held the land to be worth $7 to $15 per acre (p. 37); that all the white men connected with the agency "held the lands in question as worth $5 per acre; that it appeared that adjacent lands *** were selling for $5 to $10 per acre" (p. 38). When the Indians resisted the cession, he told them that because of the white demand the "lands will be opened before long anyway" and they should not miss the opportunity of "making a good bargain with the Government ***" (idem, p. 15). When the Indians complained that the price was too low, that adjoining lands off the reservation were selling for a much higher price and that a railroad was coming, McLaughlin told them that they had "only a life occupancy title", they were "simply tenants for life" that they could not sell the land to anyone but the Government and could not lease the land except through the Government, that therefore their tenure was less valuable then the absolute fee of a white man (idem, p. 17), and that in any event $2.50 per acre was the full value of the land.

"do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted" in Gregory county for the sum of $1,040,000. (Idem, p. 28.) The sixth article called for ratification by Congress. Appended to the agreement were the "X" marks of 12 more than three-fourths of the male adults. (Idem, pp. 29-35.)

The Secretary of the Interior transmitted to Congress the executed agreement, related papers, and a draft of a bill with a recommendation for ratification. (Idem, p. 1.) Had Congress adopted that bill, Indian title to the "surplus" land would have been extinguished. But that did not happen.

In March 1902 the Senate and House Committees on Indian Affairs reported out bills ratifying the agreement. S. Rept. 662, 57th Cong., 1st sess. (1902); H. Rept. 954, 57th Cong., 1st sess. (1902). (App. II, Docs. 4, 5.) The Senate bill included a new provision directing that sections 16 and 36 of the lands acquired in each township or equivalent lands be granted to South Dakota as school lands. (Idem, p. 2.)

The House Committee on Indian Affairs filed a second report eliminating the grant of school lands set out in the Senate bill, explaining that the committee was of the opinion that the school grant provision was "not necessary, as under existing law sections 16 and 36 would be granted to the State upon the extinguishment of the Indian title." H. Rept. 2099, 57th Cong., 1st sess., May 17,

1902, p. 1 (App. II, Doc. 6.) Objection was raised to the appropriation of public funds to pay for Indian lands that would be turned over for free homesteads and donated to the State for schools. The bills were passed over and never reached for a vote. 35 Cong. Rec. 3187-88 (1902); 35 Cong. Rec. 4801-07 (1902). (App. II, Docs. 7, 8.)

2. The 1904 Act. To overcome the objections, new bills were introduced in the next session and reported out of both the House and Senate Committees on Indian Affairs. The new version (S. 7390), followed the pretense of ratification of the September 14, 1901 agreement, but in fact simply opened the lands to settlement with the United States acting as trustee to dispose of the lands and credit the proceeds to the Tribe. (See p. 7, supra.) Sen. Rept. 3271, 57th Cong., 2d sess. (February 23, 1903); Instructions of June 30, 1903 to McLaughlin. (App. II, Docs. 9, 10.)

Doubtless because S. 7390 was a gross departure from the cession and sale agreement of September 14, 1901, Inspector McLaughlin was instructed to negotiate for the consent of the Rosebud Sioux to an agreement carrying out the essential provisions of the bill. Instructions of June 30, 1903, p. 1. (App. II, Doc. 10.) McLaughlin met with Rosebud councils on five different days over a period extending from July 24 through August 10, 1903. Council proceedings. (App. II, Doc. 11.)

McLaughlin prepared and submitted an agreement following in substance the critical provisions of the Senate bill (idem, p. 34). (App. II, Doc. 12 is the draft of agreement.) The Indians objected that the lands were worth more than $2.50 per acre because after the 1901 negotiations, the railroad had been built in that part of Gregory county outside of the reservation greatly enhancing the value of the Indian lands within the reservation;[30/] that the provisions for payment were uncertain and inadequate; that the United States did not even guarantee the payment of the $1,040,000 stipulated as the purchase price in the September 14, 1901 agreement; and that under the terms of the bill, the settlers might not make payment at all. McLaughlin report of August 31, 1903, pp. 5-6; also see the analysis of the Commissioner of Indian Affairs in his 1904 report on the negotiations. H. Rept. 443, 58th Cong., 2d sess., pp. 5-7 (January 21, 1904). (App. II, Docs. 13, 14.) McLaughlin failed to get the requisite consent. He reported that the value of the land "made it impossible for me to conclude an agreement along the lines proposed in the said Senate Bill, for the price per acre

30/ Higher values were later confirmed by the Commissioner of Indian Affairs who reported that disinterested information indicated that "the lands were worth a considerably larger price than that agreed to be paid [in 1901] *** and that no doubt the entire tract taken as a whole, exclusive of allotments, is worth considerably more than $2.50 per acre." The Commissioner concluded that the "Indians cannot see *** why they should not procure such price for the lands as settlers are willing to pay for them." H. Rept. 443, supra, p. 7. (App. II, Doc. 14.) For other material indicating that the land was worth several times the $2.50 per acre see Sen. Doc. 158, 58th Cong., 2d sess. (1904), pp. 3-7. (App. II, Doc. 17.)

which I felt obliged to insist upon under my instructions." McLaughlin report of August 31, 1903 to the Secretary of the Interior, pp. 5-6. (App. II, Doc. 13.)[31/]

Thereupon, a new bill was introduced early in 1904 (H.R. 10418) substantially the same as S. 7390, except that the requirement for Indian consent was omitted.[32/] Congress disregarded the Tribe's refusal to consent to the agreement, and the bill became the Act of April 23, 1904, c. 1484, 33 Stat. 254.[33/]

3. 1907 Act. Less than two years after the 1904 Act, Inspector McLaughlin was again instructed to negotiate with the Rosebud Tribe, this time for the "cession" of its unallotted land in Tripp county under an arrangement similar to the 1904 Act (Instructions of December 5, 1906 to McLaughlin). (App. III, Doc. 18.) In mid-December 1906, and again in mid-January 1907, McLaughlin held council. McLaughlin had with him a bill that he read and explained to the Indians. The

31/ McLaughlin got 90 signatures ("X's") at the last council. Then he toured the several districts of the reservation trying to collect signatures but fell 296 short of the necessary three-fourths. (App. II, Doc. 13, p. 4; also App. II, Doc. 14, p. 7.)

32/ The legislative history of H.R. 10418, appears in H. Rept. 443, 58th Cong., 2d sess., January 21, 1904; House debates, 38 Cong. Rec. 1421-29, January 30, 1904; S. Rept. 651, 58th Cong., 2d sess., February 4, 1904; printed in toto in Senate debate, 38 Cong. Rec. 4984-88 (April 18, 1904), all supplied in App. II, Docs. 14, 15, 16.)

33/ The Commissioner of Indian Affairs, in his report to the Secretary of the Interior made plain that the "time has come when Congress and the Indian Department are warranted in administering the tribal interests of the Indians in the United States, including the matter of disposing of such of their lands as they do not need and do not use, without consulting the Indians affected in reference thereto." (App. II, Doc. 14, p. 8.) And in his testimony to the House Committee on Indian Affairs, the Commissioner expressed what he thought of the solemn treaty guarantees calling for Indian consent to any disposal of tribal land, with the rhetorical question: "Supposing you were the guardian or ward of a child 8 or 10 years of age, would you ask the consent of the child as to the investment of its funds?" (Idem, p. 5.)

December negotiations failed. Council proceedings, in particular, pp. 13, 23, 28, 42, 43, 54. (App. III, Doc. 19, 1st section.) McLaughlin travelled to Washington for instructions and returned to the reservation for further councils held on January 17, 18, and 21, 1907 (App. III, Doc. 19, 2d section, pp. 1, 11, 38), at which he made concessions to the Indians' demands concerning price, the administration of minors' funds, allotments to 600 or 700 Indians and other items. An agreement dated January 21, 1907 was executed by 43 of the Indians present. After visiting the several districts to solicit signatures, a total of 705 thumbprints were received, 321 less than the required three-fourths majority. McLaughlin report of February 12, 1907, pp. 3, 4. (App. III, Doc. 20.)

Although the agreement was void for lack of the three-fourths majority, the Secretary of the Interior recommended a bill setting out the agreement and ratifying it. H. Rept. 7613, 59th Cong., 2d sess. (1907), pp. 5-6. (App. III, Doc. 21.) The recommendation was not followed. The House Committee on Indian Affairs reported a bill, ultimately enacted as the Act of March 21, 1907, that incorporated some of the provisions of the void agreement and rejected or modified others. (Idem, App. III, Doc. 21.) [34] The Congressman from South Dakota, the manager of the bill, on the floor, told the House that a majority of the Indians consented to the bill but made no mention that the 1868 Treaty required a three-fourths majority, Cong. Rec. pp. 3104-05, February 16, 1907.

34/ e.g. The House bill provided for townsites and reduced the rate of interest on the proceeds in the Treasury from 5% to 3%.

(App. III, Doc. 22.) On the Senate side the committee adopted House Report 7613, supra, (App. III, Doc. 23), and the Senate passed the bill without debate. 41 Cong. Rec., p. 3323 (February 19, 1907). (App. III, Doc. 24.)

4. The 1910 Act. In 1908, less than two years after the 1907 Act, a bill, introduced in the Senate (S. 9379) and reported out of committee, would authorize the sale and disposition of the unallotted land in Mellette county. The bill was "substantially the same" as the act adopted in 1908 for the Cheyenne River and Standing Rock reservations, [35] two of the six Sioux reservations segregated under the 1889 Act. (See fn. 8, p. 6, supra.) Sen. Rept. 887, 60th Cong., 2d sess., p. 1 (January 29, 1909). (App. III, Doc. 25.) The report recited that the bill was not submitted for the consideration of the Indians because "it would delay the consideration of the matter unduly" (idem, p. 2). However, the Senate refused to act on the bill in that posture. 43 Cong. Rec. 1679, February 1, 1909. (App. III, Doc. 26.) Inspector McLaughlin again was ordered to Rosebud, not to get the consent of the Indians, but simply "to take up with the Indians *** the matter of opening" part of the reservation. Instructions of April 2, 1909 to McLaughlin. (App. III, Doc. 27.)

McLaughlin travelled to Rosebud where he explained the bill and held three councils. Council proceedings, March 11, 1909, pp. 1-8; April 21, 1909, second section, pp. 1-6; April 26, 1909, pp. 6-28. (App. III, Doc. 28.)

35/ Act of May 29, 1908, c. 218, 35 Stat. 460, construed by this Court in United States v. Erickson, 478 F.2d 684 (C.A. 8, 1973), not to disestablish the Cheyenne River reservation.

McLaughlin did not seek the Indians' consent. He merely solicited their views. McLaughlin reported on his efforts but no further action was taken in the 60th Congress. McLaughlin's report of April 29, 1909. (App. III, Doc. 29.)

New bills were introduced in the next Congress and after conference to reconcile House and Senate differences not material here, the bill became law. 36/

5. 1911 negotiations. This left Todd County as the only county embraced within the Rosebud reservation that was unaffected by "surplus" land statutes. In 1911 a bill (S. 110) was introduced in the Senate to dispose of the unallotted land in Todd county. Inspector McLaughlin again was sent to Rosebud with instructions to "take up" the provisions of S. 110 with the members of the Rosebud Tribe "for the purpose of ascertaining their views ***." Instructions of May 22, 1911 to McLaughlin. (App. III, Doc. 36.) He held a council on November 1, 1911, but without success. Council proceedings. (App. III, Doc. 37.) In deferential language, McLaughlin sympathetically reported the objections of the Indians. McLaughlin report of November 3, 1911. (App. III, Doc. 38.) Even so, the Secretary of the Interior recommended enactment. The bill was reported out and passed by the Senate where it died. Sen. Rept. 1166, 62d Cong., 3d sess., pp. 3-4 (1913); 49 Cong. Rec. 3, 4210. (App. III, Docs. 39, 40.)

36/ The legislative history is found in the following: Sen. Rept. 68, 61st Cong., 2d sess. (1910), (App. III, Doc. 30); Senate debate, 45 Cong. Rec. 1073, 1075, 1910, (App. III, Doc. 31); H. Rept. 332, 61st Cong., 2d sess., reprinted in H. Rept. 429, 61st Cong., 2d sess., pp. 1-3, February 10, 1910, (App. III, Doc. 32); House debate, 45 Cong. Rec. 5456-5473, April 2, 1910, (App. III, Doc. 33); Conference H. Rept. 1368, 61st Cong., 2d sess., May 16, 1910, 45 Cong. Rec. 6415-6416, 6436, 6437, (App. III, Docs. 34, 35).

On the theory of the court below, if the 1911 bill had become law, there would be no Rosebud Indian reservation.

E. The court below inappropriately treated collateral and extrinsic materials as reflecting the intent of Congress.

1. The court below intermixed the legislative history relating to bills providing for the ratification of the September 14, 1901 voluntary sale with the history of the 1904 "surplus" land bill that ultimately became the 1904 Act. The court borrows from the 1902 Senate debates on the rejected bills, where statements were made by a Senator, not the manager or sponsor of the bill, that the lands would "become part of the public domain", would "be brought under the public domain by cession to the United States", and that payment would be "for the purpose of separating the Indians and extinguishing the reservation". Each of the quoted excerpts is underscored in the opinion below. (App. I, op. 37-38; the last quote is repeated at op. 42.) 37/

First, statements made during debate of one bill hardly provide a valid basis for finding the meaning of a bill in a subsequent Congress, designed for a different purpose.

Second, even if the quoted statements were made in connection with the bill that became law, they may not be used to find legislative intent. To be sure, as an aid to interpretation "resort may be had to *** exposition of the bill on the

37/ For full text of the debates see 35 Cong. Rec. 4801-4807, April 29, 1902. (App. II, Doc. 7.) See also 35 Cong. Rec. 3187-3188, March 24, 1902. (App. II, Doc. 6.)

floor of Congress by those in charge of or sponsoring the legislation." Wright v. Mountain Trust Bank, 300 U.S. 440, 464, fn. 8 (1937). But the comments quoted by the district court were not those of a sponsor, or of the manager of the bill. "It is the sponsors that we look to when the meaning of the statutory words is in doubt". NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964).

Third, read in the context of the debate on a bill calling for ratification of a voluntary sale for $1,040,000, the quoted statements are not inconsistent with the general understanding of the law. Under the September 14, 1901 agreement, the United States was buying and paying for the land. Full title would have passed to the United States.

In effect, the court below read these statements made during the 1902 debate of a bill to ratify the voluntary sale, a bill never reached for vote, into the legislative history of the 1904 Act, saying they "were considered by the Congress of the United States to be one and the same ***", except for the school land provision. (App. I, op. 40.) The improvident use of the legislative materials in this fashion contributed to the erroneous judgment of the court.

2. Statements made during the "negotiations" at council proceedings, even if correctly construed, are not evidence of Congressional intent. The trial court treated 1906 statements by McLaughlin, the Indian Inspector, or by Indians at the proceedings, almost as if they were to be read into the language of the statute. For example, to demonstrate that the Gregory county portion of

the reservation was disestablished, the trial court quoted McLaughlin at the council proceedings held two years later on December 14, 1906. (App. I, op. 50-51.) The quotation set out in the opinion is intended to show that when McLaughlin in 1906 said that a railroad in Gregory county "has not yet come across your reservation boundary ***", it meant that McLaughlin considered the 1904 Act portion of Gregory county to be outside of the reservation, and therefore the statute meant the same thing. The conclusion is not supported by the record or by McLaughlin's complete statement, even if post-1904 Act statements were evidence of 1904 Act intent.

It must be remembered that the eastern portion of Gregory county was never within the 1889 boundaries of the reservation. The record shows that by 1903, a railroad had been built in the eastern portion of Gregory county outside of the 1889 Act reservation. (p. 44, supra.) The record does not show whether, by 1906, an additional rail line had been built into the 1904 Act portion of Gregory county. But if the district court's quotation from McLaughlin is read in context with what proceeded it, the greater odds are that McLaughlin was including as part of the 1889 Act reservation, the 1904 Act portion in Gregory county.

When McLaughlin spoke he was responding to Two Strike, a Rosebud spokesman, who stated (Council proceedings, p. 4; App. III, Doc. 19):

> Two Strike - [From the context Two Strike may have been referring to a map]. *** The railroads pass here without paying us anything. I understand there is going to be another one through here, [38/] but we have not heard anything about the pay. My friend, tell the railroad people not to come in here, to turn back from where they are. We want our children to grow up on this reservation and on this land. ***.

McLaughlin answered (idem, pp. 4-5):

> In regard to the railroad running north of White River, [north of the northern boundary of the reservation], that road is being built across what is called the ceded portion. The Indians *** ceded that portion of the reservation in 1889 *** you have received credit ***. If a railroad was coming through your reservation proper, that is, any of the [six] segregated reservations [established by the 1889 Act], you would receive pay for it. There is no railroad running over any portion of the Rosebud Reservation, none within the boundaries of your reservation [etc., continuing with the quotation as set out in the opinion.] 39/

This colloquy has no bearing on Congressional intent. But even if it did, McLaughlin's statement, read in context, does not support the trial court's conclusion that "McLaughlin's assumption was that Gregory county was no longer a part of the Rosebud Sioux Reservation." (App. I, op. 51.)

Another example of inappropriate use of 1906 statements to show 1904 Act intent is found in the district court's use of a statement by High Pipe, a Rosebud spokesman at the 1906 council proceedings. The gist of the quotation

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38/ Two Strike speaking in the future tense may have been referring to an extension of the railroad into the reservation, or the 1904 Act portion of Gregory county.

39/ Two Strike's statement and the underlined portion of McLaughlin's answer were omitted in the opinion below. (App. I, op. 50-51.)

is that High Pipe observed that the "best land we have is in the eastern part of our reservation, Tripp County." (App. I, op. 51-52.) The court advanced the quotation as proof that the Indians considered the 1904 Act portion of Gregory county to be outside of the reservation.

High Pipe was speaking for more allotments. (App. III, Doc. 19, p. 8.) As noted, a portion of Gregory county was in the eastern part of the reservation. High Pipe knew that no allotments were obtainable in Gregory county because those lands had been proclaimed open for settlement on May 13, 1904. (32 L.D. 622 (1904).) Thus he spoke of Tripp county in terms of the eastern part of the reservation where land for allotments was available. Even if appropriate, the 1906 observation of an individual Indian, expressed in Sioux and interpreted into English, is a small item on which to rest the Congressional intent to disestablish a portion of the reservation by the 1904 Act.

F. The consistent administrative construction of the three Rosebud Acts excludes the conclusion that any of those Acts disestablished the reservation. The courts give great weight to the construction of a statute by an agency responsible for its administration. Zemel v. Rusk, 381 U.S. 1, 11 (1965); Udall v. Tallman, 380 U.S. 1, 16-17 (1965). Here the Department of the Interior charged with responsibility for Indian affairs, has consistently recognized and administered the entire reservation including the area affected by the three statutes, as an Indian reservation.

1. The Secretary of the Interior treated the Rosebud reservation as embracing the territory delimited in the 1889 Act. In the Indian Reorganization Act of June 18, 1934, c. 576, 48 Stat. 984, Congress extended the period of trust on trust allotments (25 U.S.C. 462), unless such lands were on the public domain outside of the geographic boundaries of any Indian reservation (25 U.S.C. 468). The period of trust was extended on trust allotments on lands affected by surplus land acts. See Putnam v. United States, 248 F.2d 292, 294-295 (C.A. 8, 1957).

The Indian Reorganization Act of 1934, supra, (25 U.S.C. 463), authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934, or authorized to be opened, to sale, or any other form of disposal ***." Under authority of that language, the Secretary explicitly listed for withdrawal from disposal and for restoration to tribal control, the undisposed of land on the Rosebud Indian Reservation affected by the 1904 Act, the 1907 Act, and the 1910 Act. He identified Rosebud as one of the "reservations where lands have been opened, the Indians to receive the proceeds of sale only as the tracts are disposed of." (54 I.D. 559, 561, 562 (1934).) The Supreme Court regarded 54 I.D. 559 as exemplifying the administrative view that the reservation was not dissolved. Seymour v. Superintendent, 368 U.S. 351, 357, fn. 14 (1962).

2. The Secretary of the Interior approved the tribal Constitution defining the reservation as originally established. Article I of the tribal Constitution provides that the "jurisdiction of the Rosebud Sioux Tribe of Indians shall extend

to the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889, ***." (App. IV, Doc. 53.) The Secretary approved the constitution on December 20, 1935.

3. The Field Solicitor for the Department of the Interior considered that no part of the reservation was disestablished. By memorandum dated April 6, 1972, the Field Solicitor advised the Area Director that in his opinion none of the three Rosebud Acts disestablished any part of the Rosebud reservation. (App. IV, Doc. 56.) The opinion rests primarily on an analysis of the language of the three statutes.

4. The entire area of the 1889 Act Rosebud Reservation has been consistently administered as an Indian reservation and the Indians on the reservation were administered to as reservation Indians. During the period under discussion and beyond, the reservation was divided into seven administrative districts. (App. IV, Doc. 51, p. 3.) The table following shows by districts, the location, Indian population, day schools and allotments. 40/

District	Location	Population	Day-Schools	Allotments
Agency	All in Todd Co.	1200	2	Not Available
Cut Meat	All in Todd Co.	1000	4	133
Black Pipe	All in Mellette Co.	500	4	98
Little White River	All in Mellette Co.	500	4	968
Butte Creek	Todd & Mellette	800	4	1889
Big White River	Tripp, Lyman, Gregory	500	2	1770
Ponca	Tripp & Gregory	500	1	905
Totals:		5000	21	5763

40/ The names and locations of the districts and day schools are shown on the map (App. IV, Doc. 43). The population, number and names of the day schools and the number of allotments are shown in App. IV, Doc. 42, letter of April 26, 1913.

The agency headquarters were and still are at Rosebud in the Agency district. A "Farmer" had administrative responsibility for each district. He acted as a subagent. (App. IV, Doc. 51, p. 3.) On the seven districts were 21 day schools,[41] three boarding schools,[42] eight issue stations (App. IV, Doc. 43, map), and the Agency headquarters. Issue stations and day schools were located in each district. The Farmer's headquarters for each district were located at the station where the Indians were issued their rations and supplies and received instructions from the Farmer. (App. IV, Doc. 42, p. 2.) The younger Indian children attended the day schools in the various districts, and the others attended the three boarding schools in the Agency district. (App. IV, Doc. 40A, p. 371.)

Before the three Rosebud statutes were enacted, and since, the entire area, as defined in the 1889 Act, has been administered as a reservation by the officers of the United States entrusted by Congress to carry out the Federal law and to expend Federal and tribal funds. The National Archives contains thousands of communications to and from the Rosebud Indian Agency from before the time the reservation was established in 1889. These communications evidence continued administration of the reservation defined in the 1889 Act as the Rosebud reservation.

41/ The 21 day schools are listed in App. IV, Doc. 50 (letter, September 18, 1913).

42/ Two mission and a Government school, all in the Agency district. (App. IV, Doc. 52.)

It is impracticable to deal with the mass of Archives material in an appellate brief. To bring even the flavor of the materials to the Court, we refer to the annual Agency reports for 1913. The reports cover Industries and Agriculture, Indian Homes, Female Industrial Teachers, Health, and Construction for the entire 1889 Act reservation. (App. IV, Docs. 44-49.) A partial report on education is also included. (App. IV, Doc. 50.) These reports show Federal administration and activities in each district of the reservation. Certainly, contemporaneous with the statutes and thereafter, the United States did not regard any part of the Rosebud reservation as disestablished. And there has been no change since. (See pp. 54-55, supra.)

G. Selected phraseology in subsequent legislation is equivocal with respect to fixing the Congressional intent expressed in the three Rosebud statutes. The court below pointed to four acts of Congress subsequent to the Rosebud statutes in each of which the affected land was referred to as "within the former Rosebud Indian Reservation" or "what was formerly a part of the Rosebud Indian Reservation" or equivalent language. (App. I, op. 47, 48, 59, 72.) The court deemed such expressions to be indications of the Congressional intent to extinguish the reservation status. (App. I, op. 48, 61, 67.) The court made no reference to similar statutes, that granted time extensions to settlers but did not refer to the reservation as "former". (e.g., Act of March 26, 1910, c. 129, 36 Stat. 265; Act of May 28, 1914, c. 102, 38 Stat. 383.)

The district court placed undue significance on such statues. All were enacted for the benefit of the public land homesteader, in connection with the administration of the public lands by the General Land Office. As might be expected, these public land statutes were framed in the publicland vernacular. They contain no language deliberately chosen to express an intent of Congress, one way or the other, with respect to the dissolution of an Indian reservation. Compare Gila River v. United States, ____ Ct. Cl. ____, (slip op, p. 8, April 17, 1974).

Where a statute is Indian-oriented, different language is employed. For example in 1964, Congress enacted a statute entitled "An Act to place in trust status certain [Federal] lands on the Rosebud Sioux Reservation" and transferred to the Tribe, title "to the following described tracts *** on the Rosebud Sioux Reservation", including 320 acres described in the statute as located in Mellette county (E½ of Section 35, T. 42 N., R. 33 W., 6th P.M.). Act of August 20, 1964, 78 Stat. 560. If Mellette county were not part of the reservation in 1964, why was Congress restoring to the Tribe title to land in Mellette county, which according to the court below was wiped out as a reservation some 60 years earlier?

Another Indian-oriented example is found in the Act of March 3, 1909, c. 263, 35 Stat. 781, 3 Kappler 388, 417. That act authorizes the Secretary to issue a fee patent "for the land set apart to the Catholic Church on the Rosebud *** Reservation, *** as follows: [describing land in Section 7, Township 96 North, Range 71 West of the 5th P.M.] in Gregory county]". According to the court below in 1909 that land in Gregory county was outside the reservation.

Thus, although the court below limits its attention to statutes sustaining its position, there are statutes from which no position or an opposite position may be gleaned. Viewed as a whole, the subsequent enactments are inconsistent, inconclusive and for that reason not a reliable indicator of Congressional intent. "[S]ubsequent legislation usually is not entitled to much weight in construing earlier statutes." Mattz v. Arnett, ____ U.S. ____, 37 L.ed.2d 92, 107, fn. 25 (1973). City of New Town, North Dakota v. United States, 454 F.2d 121, 125 (1972); United States v. Erickson, 478 F.2d 648, 687 (1973). The subsequent statutes selected below have no influence on the determination of the Congressional intent expressed by the three Rosebud statutes.

Conclusion

The judgment below should be reversed and the case remanded with instructions to enter a judgment declaring that the boundaries of the Rosebud Indian Reservation are those fixed by the Act of March 2, 1889, c. 405, 25 Stat. 888.

Respectfully submitted,

/s/ Marvin J. Sonosky

Marvin J. Sonosky
2030 M Street, N. W.
Washington, D. C. 20036

Local Counsel:

John E. Goodrich
216 East Capital
P. O. Box 1084
Pierre, South Dakota 57501

SECTION 2

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

ROSEBUD SIOUX TRIBE,

Appellant

v.

HONORABLE RICHARD KNEIP, et al.,

Appellee.

No. 74-1211

Appeal from a judgement of the United States District Court
for the District of South Dakota concerning a declaratory judgement action
to determine the boundaries of the Rosebud Indian Reservation

Hon. Andrew W. Bogue, Judge

BRIEF OF APPELLEE

William F. Day, Jr.
142 East Third Street
Winner, South Dakota 57580
(605) 842-1676

Tom D. Tobin
422 Main Street
Winner, South Dakota 57580
(605) 842-2500

Attorneys for Appellee

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IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

ROSEBUD SIOUX TRIBE,
Appellant

v.

HONORABLE RICHARD KNEIP, et al.,
Appellee.

No. 74-1211

Appeal from a judgement of the United States District Court for the District of South Dakota concerning a declaratory judgement action to determine the boundaries of the Rosebud Indian Reservation

Hon. Andrew W. Bogue, Judge

BRIEF OF APPELLEE

Appellee adopts, for the purposes of this brief, the material in appellant's brief under the heading "Jurisdictional Statement" and "Statutes Involved."

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether or not the Acts of April 23, 1904, 33 Stat. 254; March 2, 1907, 34 Stat. 1230; and May 30, 1910, 36 Stat. 448, were intended by Congress to diminish the Rosebud Reservation as originally defined in the Act of March 2, 1889, by disestablishing certain portions thereof.

STATEMENT OF CASE

The Rosebud Reservation was created by the Act of Mar. 2, 1889, 25 Stat. 888. Although it was stated in the preamble to be a "permanent" reservation, Section 12 therein provided the means by which the United States could buy and the members of the Rosebud Sioux Tribe could "sell" such "portions" of the "reservation" as could be agreed upon from time to time, subject, of course, to the ratification of Congress. The portion of the reservation "sold or released" was "to be held by the United States for the sole purpose of securing homes to actual settlers." Act, *supra*, Sec. 12.

Pursuant to Section 12, the United States initiated three separate negotiations with the members of the Rosebud Sioux Tribe. Each of these resulted in the passage by Congress of three separate acts: The Acts of April 23, 1904, 33 Stat. 254; March 12, 1907, 34 Stat. 1230; and May 30, 1910, 36 Stat. 448, encompassing what is now approximately one-half of Gregory County, all of Tripp County and a portion of Lyman County, and all of Mellette County, South Dakota, respectively.

The portions of the reservation thus acquired by the United States were released by the United States to actual settlers. This area now consists primarily of a patchwork of small farms, on or near which a total population of approximately 20,000 individuals reside.

In 1972 the Rosebud Sioux Tribe initiated this action in Federal District Court for the District of South Dakota to seek "declaratory judgment as to the effect of these acts on the size of the reservation." Answer for Plaintiff in reply to Counties' request to make more definite and certain, at 2 [hereinafter cited as A.P.]. In a well written and extensively documented opinion, the court below held that " the surrounding legislative history and the circumstances *clearly*" indicated that the Rosebud Reservation had in fact been diminished and that each of the counties concerned had in fact been separated therefrom. This opinion, which is still in the process of publication and therefore to date unreported, is reproduced in Appellant's Appendix 1 at 27 (hereinafter cited as A.A.).

This appeal followed.

INTRODUCTORY STATEMENT

> In order to understand Federal Indian law, a constant awareness of history must be maintained. The early pronouncements, such as those of Chief Justice Marshall, quoted in this threatise must be considered in the light of the historical situations then existing. There is a great expanse between the status of Indians as dependent nationalities in Marshall's time and their national citizenship today. Federal protection of the tribal government, which now exercise what are recognized simply as municipal powers, still survives, but not on the original basis.
>
> It has not been presumed that Congress has ever intended, nor does intend, any fraudulent objective or any base act in its legislation in the unique field of Indian affairs. Courts presume that Congress acts in good faith and that presumption is adhered to in this revision. Further, it has been assumed that nothing could be more destructive of good will or more inimical to the advancement of which Indians are known to be capable than an immoderate accentuation of the idea that the United States Government is under a special obligation to all citizens who have Indian blood as a distinct class because of real or fancied injustices to their ancestors. In this connection it should be noted that there is a tendency to emphasize the obligations of the Government of the United States as a trustee of the Indians and their rights. There is a related tendency in so doing to minimize the fact that it is also trustee of the rights of all the citizens and nationals of the United States.
> DEPT. OF INT., FEDERAL INDIAN LAW 2 (1958).

It is the appellee's position that neither *Seymour*, *Mattz*, nor the recent opinions constitute any sort of a mandate for this Court to rule in the tribe's favor if this Court is convinced, and that conviction is soundly based upon probative evidence of congressional intent, that Congress, by the passage of the three Rosebud acts, intended to diminish the Rosebud Reservation.

As Justice Frankfurter once stated:

> Indian law is a vast hodge podge of treaties, judical and administrative rulings, and unrecorded practices in which the intricacies, the perplexities, the confusions and injustices of the law governing Indians lay concealed.

Compounding this complexity is the fact that the Court has been asked to ascertain precisely what effect a congressional delegation legislating in the first decade of the 20th century intended certain acts to have on the Rosebud Reservation. In this respect the usual "vantage point of time" is in actuality a serious disadvantage, and with this in mind, appellee has attempted to reconstruct the situation as it existed in the early 1900's with the aid of:

1. The text of the three acts.
2. The Senate and House Documents;
3. The Congressional Record;
4. The transcripts of the negotiation sessions;
5. Correspondence and reports from the Department of the Interior and the Commissioner of Indian Affairs; and,

6. Later statutes, state historical documents and reports of the Rosebud Indian Agents.[1]

The appellee realizes the limited probative value of some of these materials, but has nevertheless included them in order to recapture the tenor of the period. This tenor represents, in effect, your appellee's theory in this action. In this respect, the appellee would urge the Court not to place too much emphasis or significance on any one word or sentence in any of this material. Congressional intent can be a very illusive concept. For example, the following quotation appears in appellant's brief below at page 15.

> [T]his bill is in line—if fact, almost a duplication—of bills that have heretofore passed and become law, proposing to dispose of surplus and unallotted lands of the different Indian reservations of the country. . .[T]here are two propositions to be considered in disposing of the unallotted and unused lands on Indian reservations. One is, at earliest possible date, to get among the Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms. . .[This] will have the effect of civilizing the Indians who have allotments and also give value to these allotments which at present are of very little value. . .In addition to that, just as soon as these reservations are opened up and settled[,] railroads usually come in and thereby give greater value to the lands owned by the Indians. Brief for Plaintiff below at 15. [hereinafter cited as B.P.]

Apart from the fact that this was one of the only three isolated references to the Congressional Record or Senate and House Documents in appellant's entire brief below, the quotation is illustrative of two other factors of which the court should be aware.

In the first place, to cite this statement for the proposition that "Contemporary history indicates that Congress did not intend the three acts to operate to diminish the Rosebud Reservation" (B.P. at 14) is highly questionable—at least in the *form* presented to the court below. Congressman Burke actually stated:

> Mr. Burke of South Dakota. . .I might say, Mr. Speaker, that there are propositions to be considered in disposing of the unallotted and unused lands on Indian Reservations. One is, at the earliest possible date, to get among the Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, and doing no good, opened up and developed into farms, *AND I BELIEVE THAT THE PLACING THROUGH WHAT WERE HERETOFORE RESERVATIONS* actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to these allotments which at present are of very little value. 45 Cong. Rec. 5457 (1910) (emphasis added).

The court will note how, by the use of three small dots and the deliberate omission of several very important words, the tenor of an entire paragraph can be destroyed.

Secondly, and more importantly, the correct quotation is illustrative of an even greater problem. Many of the materials with which the court will be presented contain references to "on," "in," and "within," such as the "on" in the above quotation. Initially one might equate the "disposing of the unallotted and unused lands *on* Indian Reservations" with the continued existence of the reservation. Yet, shortly thereafter, is an unequivocal reference to the placing of settlers "through what were *heretofore* reservations." By itself, the paragraph might seem ambiguous and confusing; but when viewed as an integral part of the other material of the period, the tenor of the entire paragraph clearly emerges and this is the important point. Unless these materials are placed in their proper context *and viewed in their entirety*, the crux of nearly a decade of Indian legislation intended by Congress to extinguish certain portions of the Rosebud Reservation will be for naught, much to the detriment of the non-Indian settlers and their descendants, who will over sixty years later suddenly find themselves within the exterior boundaries of a reservation and subject to a tribal jurisdiction, the limits of which appellant did not even care to expound upon in the court below.

Appellee agreed with appellant that the exact powers of the Rosebud Sioux Tribe are not in litigation at this time and for this reason a discussion of these powers has not been presented in this brief. However, it is interesting to note that even the cursory list appearing in plaintiff's answer to the counties' motion for a more definite statement does not appear anywhere within either the brief below or appellant's brief to this Court. Since it is asking this Court to declare, in effect, that the counties are within the Rosebud Reservation and therefore subject to these tribal powers, the counties think some mention should be made of the scope of this tribal jurisdiction. Plaintiff's list will suffice for this purpose:

(a) Criminal Jurisdiction, *Smith v. Temple*, 152 N.W. 2d 547, 548.

(b) Civil Jurisdiction, *Smith v. Temple*, *supra*.

(c) Sales tax authority, attached memorandum for the South Dakota Department of Revenue and within this area the Rosebud Sioux Tribe and the United States would have jurisdiction to the exclusion of the defendants.

1. Appellee has relied primarily on the contemporary documents of the period; the bulk of the material presented in this brief is from pre-1910 sources, with some material dating up to 1920. It is appellee's position that this is the period from which the intent of Congress should be gleaned. The direction or purpose of "Indian Policy" fluctuated in later decades and for this reason appellee has been somewhat reluctant to accept any later reference at face value unless that reference could be substantiated in the documents of the period to which it referred. In this respect, it has followed the mandate of Tacitus. . ."Refer everything back to its own year."

(d) Tribal taxing authority, *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89.

(e) Tribal regulation of intoxicants, 28 U.S.C. Section 1161.

A.P. at 2.

It is the appellee's position that Congress, by the passage of the three acts, intended to separate and remove the counties from the Rosebud Indian Reservation in such a manner that they would never again be considered to be either within the exterior boundaries of the reservation or subject to whatever powers the Rosebud Sioux Tribe might lawfully exercise therein. The purpose of this brief is to present to the Court probative evidence of that intent.

ARGUMENT

1904 Act[2]

I. *THE GENESIS OF THE 1904 ACT*

A. THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

Subsequent to the date that appellee submitted its brief to the court below, six separate cases concerned with issues similar to the ones presented herein have been decided.[3] Perhaps the most influential of these in terms of the format of the argument to be presented to this court was *United States ex rel Feather v. Erickson*, 489 F.2d 99(C.A.8, 1973). In the court below counsel for plaintiff had conceded in its brief that the ratification of the 1901 "cede, sell, relinquish" lump-sum cession agreement would have diminished the Rosebud Reservation. Consequently, appellee qualified and limited the presentation of the documents related to that agreement for the express purpose of a simple comparison with the 1904 Act. Substituted counsel for the appellant has now apparently taken another position, although it is not altogether clear from appellant's brief. In one portion thereof a position is taken that the 1901 materials will not necessarily support a diminution in light of *Feather*. In many others however it was "improvident" for the lower court to consider

2. Act of April 23, 1904, 33 Stat. 254—A portion of Gregory County. A detailed history of the openings of the Rosebud Reservation appears in 18 S.D.L.Rev. 85 (1973). Your appellee will use the same chronological approach appearing therein, although in a summary fashion, in this brief.

3. *United States ex rel Condon v. Erickson*, 478 F.2d 684(CA 8 1973); *Mattz v. Arnett*, 412.U.S. 481 (1973); *State of South Dakota v. Wilhamson*, 221 N.W. 2d 182 (S.D. 1973); *DeCoteau v. District Court*, 211 N.W. 2d 843 (S.D. 1973); *United States ex rel Feather v. Erickson*, 489 F.2d 99 (1973); *Cook v. South Dakota*, No. 11326-2-FGD (S.D., filed Mar. 13, 1974).

the 1901 materials—they were "designed for a different purpose"—were not inconsistent with the general understanding of the law (in light of *Feather*??)—and were used by Congress as a "facade" (for what, in light of *Feather*??) or a pretense of an agreed cession (for what reason, in light of *Feather*??). In light of the position taken by counsel for appellant in 48 N.D.L. Rev. 551 (1972) and before the South Dakota Supreme Court in *State v. Molash, supra*, that the Yankton and Sisseton Reservations were disestablished by acts of nearly identical wording, this ambivalence is understandable although nevertheless confusing.

In any event appellee will take the position that in light of the *Feather* opinion, all of the Rosebud documents from this era can be equally persuasive, in this respect, in ascertaining the intent of Congress. In other words there was no "new policy" but rather, as aptly stated in the *Condon* opinion "simply a new method utilized by the Congress that no longer favored purchasing Indian Land and providing them free of cost to settlers." 344 F.2d at 687.

Secondly, with respect to the *Mattz* opinion, appellee notes and considers extremely significant the fact that the court in *Mattz* cited and utilized everything from the history of bills that were never enacted to various Annual Reports from the Commissioner of Indian Affairs, to ascertain whether or not Congress intended to disestablish the Klamath River Reservation. In this brief appellee will do the same with the purpose of surpassing the standards set forth by the United States Supreme Court that it be "clear" to this Court from the "surrounding circumstances and legislative history" that the Rosebud Reservation was in fact diminished. *Mattz, supra*.

In this light, and in view of the cardinal rule of Indian law that separate treaties with separate tribes must be separately construed, appellee is confident that the Rosebud materials are sufficiently persuasive with respect to what Congress intended to do to the Rosebud Reservation to be distinguishable from, and suggest a conclusion opposite of the rulings of the recent decisions of this Court, - while at the same time following the guidelines set forth therein.

In *Condon, supra*, this Court found the question presented to be "close" and resolved the issue in favor of the tribe. In this case the question presented remains the same, but the question is not close. As the lower court stated:

> The allottment sections, the school land provisions, the many negotiations conducted by Inspector McLaughlin, the congressional reports and debates, and the subsequent congressional enactments for each act lead this court to believe and be of the opinion that the surrounding legislative history and circumstances *clearly* indicate a congressional intent to separate each of the counties concerned, to return those counties to the public domain, and to extinguish the reservation or "Indian land" nature of those

counties thereafter.

A.A.1 at 74-75.

1. 1901 Negotiations.

Since 1889, Gregory County had been anxious to acquire that portion of the Rosebud Reservation within its boundaries, ostensibly because the county government could not be maintained by the number of settlers on the small amount of non-reservation land available within it. After nearly two years, the county obtained the assistance of the very able congressional delegation from South Dakota.[4] and under their direction the processes of acquisition were set in motion. Inspector James McLaughlin,[5] at the direction of the Department of the Interior and pursuant to Section 12 of the 1889 Act, was instructed to go to the Rosebud Reservation to treat with the Indians for a cession of this land. Although it was stated in the preamble that this was to be a "permanent" reservation, as noted by appellant, Section 12 therein provided:

> SEC. 12. That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner, if in the opinion of the President it shall be for the best interest of said tribe, it shall be lawful for the Secretary of the Interior to *negotiate* with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which said reservation is held of *such portions of its reservation* not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said

4. The dominant members of South Dakota's congressional delegation consisted of Senator Robert J. Gamble and Congressman Charles H. Burke. Senator Gamble was elected to the United States Senate in 1900. He remained in that office until 1912. He was very active in all legislation concerning Indian lands durig that period.

Senator Gamble's fellow solon, Charles H. Burke, was elected in 1900. He remained in that office until 1906 when he was defeated in the election. He was, however, re-elected in 1908 and served until 1914. Congressman Burke later served for several years as Commissioner of Indian Affairs.

These two gentlemen had many things in common:

(1) Both chaired the Indian Affairs Committees in their respective houses.
(2) Both authored considerable legislation affecting Indians and Indian lands.
(3) Both submitted the committee reports concerning the legislation discussed herein to their respective houses.
(4) Both were members of the congressional delegation before the West River Reservation was diminished.
(5) The materials herein indicate that both understood the so-called "Crook Treaty," and were aware of its relation to later acts.
(6) One or the other of these men introduced and sponsored the bills presented therein.

5. Inspector James McLaughlin was United States Indian Inspector for the Department of the Interior. He had considerable experience in this particular area and eventually served the Office of Indian Affairs for over 50 years.

> tribe of Indians, which purchase shall not be complete until ratified by Congress: *Provided, however*, That all lands adapted to agriculture, with or without irrigation, so sold or released to the United States for the *sole purpose of securing homes to actual settlers*, and shall be disposed of by the United States to actual and bona-fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education. . . . Act of March 2, 1889, Section 12, 25 Stat. 888 (emphasis added).

In early 1901 Inspector James McLaughlin, acting pursuant to Section 12 and at the request of the Department of the Interior, concluded an agreement with the Indians for an outright lump-sum cession of the surplus portion of the Rosebud Reservation lying within Gregory County. As stated above, appellant conceded in the court below the effect this agreement would have had on the boundaries or size of the Rosebud Reservation had it been immediately ratified. Consequently, appellee's brief below only summarily referred to the documents that confirmed that concession. In light of appellant's new position, and *Feather, supra*, however, a more detailed account of the negotiations would seem appropriate.

In the first instance, appellee's argument in relation to the effect the 1901 agreement would have had on the size or boundaries of the Rosebud Reservation is *not* premised solely on the fact that the operative language of the 1901 agreement contained the "cede, sell, relinquish" preamble of nearly 40 years of established cession agreements which extinguished reservations throughout the entire Western United States. Nor is it premised solely on the fact that the government was to purchase the land for a sum certain and without the trust restrictions of those surplus cession agreements tailored to comply with the Dawes Act of 1887. Rather, the thrust of its argument is founded upon the clear and concise documentation of that effect which appears in all the materials which surrounded the 1901 negotiations and the agreement both before and after it was amended: a documentation that the Rosebud Reservation was to be "diminished" to a "nice square reservation," a "square tract about the same size and area of the Pine Ridge" reservation, that by "disposing of this corner of the reservation," the members of the Rosebud Sioux Tribe would have a "nice square reservation," a "compact and almost square area about the same size and area as the Pine Ridge Reservation," in effect a "diminished reservation." For example, the following series of interchanges that took place at a counsel on August 13, 1901, in the Ponca Creek District of the Rosebud Reservation:

> Inspector McLaughlin: My friends, I have called to see you today for the purpose of ascertaining whether or not you are willing to sell the unallotted lands in Gregory County to the Government. . . .You doubtless know that there has been considerable talk for the past two years of *negotiating with you people for this corner of the reservation*. . . In negotiation with Indians for tracts of land, a portion of which has been allotted to them, *the privilege has been given the Indians to elect whether they shall*

remain upon their allotments or relinquish their allotments and remove to the reservation. I do not think that it is for the best interest of the Indians at any time to vacate their allotments. The lands that you have taken are, of course, the best lands of this county, and it is very doubtful if you could find as good land anywhere within the *diminished reservation for the reason that the best lands have all been allotted . . .If you dispose of this surplus land* it will leave you about the same size reservation as the Pine Ridge Indians have. . . .By disposing of this little corner of the reservation, it would leave you a nice square reservation and the proceeds of the sale would benefit you very much. Council Transcript at 1, April 13, 1901 (emphasis added). [hereinafter cited as C. T.]

Again, on April 15, 1901, when Inspector McLaughlin met with the Indians of the Big White River District he explained the situation in the same manner as he did in the Ponca Creek District:

> Every person would have the privilege [sic] of remaining on the land that has been allotted to him, or of relinquishing it and *removing to the diminished reservation, but I would advise you who have selected tracts of land to remain upon your allottments in case of the cession of this land to the Government* . . . . C.T. at 1-3 (emphasis added).

Similarly, on September 5, 1901:

> Inspector McLaughlin: I am here under orders of the Secretary of the Interior who was authorized by Congress, at its last session, to negotiate through any Indian inspector, with any Indian tribes for the cession of their surplus lands, and he has sent me here to negotiate with you for your surplus lands in Gregory County, that is, for all of your lands in Gergory County that has not been allotted to Indians. .If an agreement for these is reached by us, the allottees of Ponca Creek district will be brought into direct contact with the white settlers but as I said before, it is only a question of time until that condition has to be met. . . .
>
> *The cession of Gregory County will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge reservation.* . . C.T. at 1-4, Sept. 5, 1901 (emphasis added)

And the members of the tribe were very much aware of the fact that this was the "effect" the 1901 agreement would have. Statements similar to the one by Ralph Eagle Feather appeared throughout the entire transcript:

> We Indians intend to own the land and have taken it in allotment just as the president said to take it. We want payment for all vacant land left after that. After that the Indians for future generations can live upon the land and own it, that is, the land within the *diminished reservation*, in case Gregory County should be ceded. CT at 24, Sept.10, 1901 (emphasis added).

The one thing that is clear from the appellant's brief with respect to controverting this aspect of the effect the 1901 agreement would have had on the Rosebud Reservation, even though its exact position on this overall issue is uncertain, is the rather conspicuous absence of citations or quotations from any contemporary source dealing with the Rosebud Reservation to support a

contrary conclusion. The reason for the "conspicuous absence" of such material in appellant's brief is, of course, that it simply does not exist. To compensate, therefore, appellant resorts to what appellee would term its "bad faith argument"—charging Congress either directly or by innuendo with "pretenses," "camouflages," "intent to defraud," or calling the court's attention time and time again to the lack of the requisite consent of the members of the tribe to any of the acts therein presented for construction—an argument that should be dispensed with at the outset.

Even if some of these allegations are correct—certainly appellee has never argued that Congress always maintained that degree of trust to which it was bound to adhere to in dealing with its Indian wards—the fact remains that these are questions of policy—questions reserved for the United States Court of Claims and are not properly before this Court and should not have any bearing on the resolution of congressional intent presented herein. The lower court recognized this argument of the appellant near the conclusion of its opinion:

> While this Court does not necessarily agree withthe mores or the methods employed at that time, there is little doubt that the congressmen were engaged in the process with the "doing away" of the reservation. This Court's only function is to determine congressional intent, not to rewrite history. A.A.I at 78.

And by so stating, the court below was complying with the dictate of the United States Supreme Court that:

> But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution in the political departments of the Government. Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the Court of Claims or this court with the authority to determine whether or not the United States had, in its treaty with the Indians, violated the principles of fair dealing. *United States v. Choctaw Nations*, 179 U.S. 494 (1900).

With respect to the " no consent" charge by appellant and in partial defense of Congress and all concerned it must at least be noted that the Rosebud documents are replete with citations to the 1903 United States Supreme Court decision of *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The import of this decision, at least as far as Congress was concerned, was that Congress had the plenary power to deal with the Indians as it saw fit. In applying this principle to the Rosebud Indians, it soon became evident that it no longer needed the ratification of three-fourths of the adult male Indian population of the Rosebud Reservation as consent to any cession of the Rosebud

Reservation. Under the Dawes Act, some form of consent was needed nevertheless, and the Office of Indian Affairs felt that a concurrence of the majority of adult Indian males would suffice for this purpose. Although this explanation appears again and again in the Rosebud documents, it is interesting to note that appellant has neglected to mention this fact.

2. 1901 Agreement: School Land Section.

As further documentation that the 1901 agreement was intended to diminish or extinguish a portion of the Rosebud Reservation your appellee cites the school land section which the court below referred to as:

> [A]n unequivocal statement in corresponding action by the Senate of the United States premised solely and only upon the fact that the title of the Indians was extinguished and the lands restored to the public domain. It is a strong indication by Congress that its intention was to diminish the size of the Rosebud Reservation. The amendment was adopted without discussion, again buttressing the impression that the diminution of the Rosebud Reservation was a premise upon which all members of Congress acted when enacting the various Indian acts. A.A.I at 44.

More specifically the court below was referring to the fact that on the first day the original 1901 lump-sum cession agreement was presented on the floor of the Senate for ratification, Senator Gamble immediately proposed, and the Senate immediately agreed to, without discussion, the following amendment:

> The next amendment was, at the end of the bill, to insert the following as a new section:
>
> SEC. 4. That sections 16 and 36 of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools, and the same are hereby granted to the State of South Dakota for such purpose; and in case either of said sections, or parts thereof, of the lands in said county of Gregory is lost to said State of South Dakota by reason of allotments therof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract herein ceded, to locate other lands not occupied, in quantity equal to the loss, and such selection shall be made prior to the opening of such lands to settlement.
>
> The amendment was agreed to. 35 Cong. Rec. 3187 (1902).

Senator Gamble then explained the reason for its inclusion to the Senate:

> Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. *This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinquished and the lands became a part of the public domain.* This would withdraw about 29,000 acres of these lands and would leave about 387,000 acres to be open to settlement and which would be affected by the proposed amendment. Cong. Rec., *supra* (emphasis added).

The provision of the enabling act to which Senator Gamble referred provided:

> Nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act *until the reservation shall have been extinguished and such lands be restored to, and become a part of the public domain.* Act of February 22, 1889, ch. 180, 25 Stat. 676 (emphasis added).

The Committee of Indian Affairs first suggested the school land provision when the bill was pending before it, even though Senator Gamble felt that the provision itself was superflous as the grant to the state would become operative without further legislation when, in his words, the "reservations were opened, as in this case, and became a part of the public domain. . ." 35 Cong. Rec. 4856 (1902). If the original 1901 lump-sum cession agreement had been ratified, the reservation would have been "extinguished" and the land restored to the "public domain." The Indians would have been left, what Inspector McLaughlin referred to as a "nice square reservation."

In the court below appellant's original brief merely noted the school lands were exempted from sale and/or disposition and did not offer to quote one word of explanation for this provision. Then, after appellee had presented its argument appellant *did* make a rather ineffective attempt to controvert the presence of the school land provision in its reply brief. The court below dismissed appellant's argument simply because it was contrary to what was stated in page after page of the Congressional Record in the Senate and House Reports on the bills. Before this Court, appellant now attempts to explain away the explicit statements in the House and Senate Reports and in the Congressional Record in a similar manner by citing case law in which the courts were not even concerned with whether or not the reservation was disestablished and extinguished, but rather simply when that extinguishment of Indian title took place. Appellant then conludes with "Again the district court's position that the school land provisions demonstrated disestablishment of the reservation is left without foundation." B.A. at 31. Even more astonishing is the fact that the *Brindle* and *Hitchcock* decisions cited by appellant were concerned with cession statutes which did disestablish reservations! Perhaps this is the reason that neither of these decisions has ever been cited by any of the courts recently, including the United States Supreme Court, when resolving an issue similar to the one presented herein. They are simply immaterial to the issue.

3. Congressional Record.

Approximately 50 pages of the Congressional Record now record the heated debate that took

place on the floor of the Senate in March and April of 1902. The sole subject of this debate was a ratification of the original 1901 lump-sum cession agreement and the appropriation policy for which it stood. In light of the statement in *Condon* that "this was simply a new method utilized by a Congress that no longer favored purchasing Indian lands and providing them free of cost to settlers," however, most of the "new policy" material presented to the court below can now be deleted. 344 F.2d at 687. Nevertheless, because your appellee must persuade this Court that the 1901 agreement was intended to disestablish a portion of the Rosebud Reservation some of the material is deserving of at least a cursory examination.

For example, in the April debate on the original 1901 agreement Senator Platt attributed this same precise effect to the agreement that Inspector McLaughlin, the members of the Rosebud Sioux Tribe, and Senator Gamble had in the materials set forth above:

> Mr. PLATT of Connecticut. . . . I do not know how many million acres still remain in Indian reservations which must in the future be opened to public settlement, but there are many millions, and, at the rate we have been paying the Indians under the agreements made with them for such lands, the amount to be expended in the not very distant future will run up into the millions. . . .
>
> Now, this particular agreement comes here to be ratified upon a payment to the Indians of about $2.50 an acre for the surplus lands within their reservation which are under the agreement to be ceded to the United States and become part of the *public domain*. The Indians in negotiating said that was not a fair price for the lands and they were worth a great deal more, but finally the negotiation was concluded. The agreement comes here. So far as the Senate considers it, it is an agreement to open a reservation to pass ordinarily without any particular examination or any thought of the consequences to the Government in the matter of expense. I will not go into the history of the negotiations as to these lands, but the price paid or agreed to be paid to the Indians is $2.50 an acre for the entire acreage which is to be brought under the *public domain* by cession to the United States.

And so did Senator Clapp:

> Mr. CLAPP. . . .Here is this reservation in South Dakota. Of course the Senators from South Dakota can speak more specifically of the character of the reservation and its surroundings than I can; but because we have to pay the Indians a certain amount for that reservation, as a matter of progressive Indian policy, for the purpose of separating the Indians and *extinguishing the reservation* or for the purpose of meeting the advancing demands of civilization for the use of the lands, it does not follow that land is primarily and inherently worth so much an acre. 35 Cong. Rec. at 4801, 4802, 4807. (emphasis added).

Similar remarks attributing a similar effect appear throughout the debate on the 1901 agreement, but they would appear unnecessary in the absence of any citations to or quotations from, any other contemporary source by the appellant indicating a congressional intent to the

contrary. The 1901 agreement was intended to disestablish a portion of the Rosebud Reservation as stated by the court below.[6]

4. Remove to the reservation or diminished reservation.

In the 1901 Ponca Creek District council, Inspector McLaughlin told the members of the Rosebud Sioux Tribe that:

> In negotiating with Indians for tracts of land, a portion of which has been allotted to them, the privilege has been given the Indians to elect whether they shall remain upon their allotments or relinquish their allotments and remove to the reservation. I do not think that is is for the best interest of the Indians at any time to vacate their allotments. The lands that you have taken are, of course, the very best lands of this country, and it is very doubtful if you could find as good land anywhere within the diminished reservation for the reason that the best lands have all been allotted. C.T. at 1-2, April 13, 1901.

Such privileges were usually given to any member of any tribe which was about to cede a portion of its reservation in which allotments had previously been made. Ordinarily, this privilege would expire upon the date the lands were to be proclaimed open to settlement. For example, the 1891 Act that disestablished a portion of the Crow Reservation provided:

> That all lands upon that portion of the reservation to be herein ceded which, prior to the date of this agreement, have been allotted in severalty to Indians of the Crow tribe shall be retained and enjoyed by them: *Provided, however*, That such Indians shall have the right at any time within three years to surrender his or her allotment, and select a new allotment within the retained reservation upon the same terms and conditions as were prescribed when selecting the first allotment. Act of March 3, 1891, 26 Stat. 4041.

In other cases the wording of the provisions which were explicitly set forth in the act would vary from "remove from the ceded area" to "remove to the remaining" or "diminished reservation." Apart from the probative value of such provisions in so far as they confirm the disestablishment of a portion of the reservation, one other ramification of such a provision that is heavily played upon by appellant is entirely misplaced: the fact that some members of the tribe would necessarily be residing upon allotments outside of the boundaries of the reservation.

Assuming the three Rosebud acts did disestablish a portion of the Rosebud Reservation all of the trust allotments situated therein would nevertheless still be defined as Indian Country for the

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6. Some of the 1903 and 1904 materials as well as other material attribute this same effect back to the 1901 agreement.

purposes of Federal and tribal jurisdiction – this was the case in the early 1900's and it is the case today.

Yet at 13 of Appellant's brief the following statement appears:

> One of the effects of disestablishing the reservation is to destroy its status as Indian country as defined in 18 U.S.C. 1151, to eliminate tribal and Federal jurisdiction, to subject the Indians to the loss of Federal and tribal benefits available only to reservation Indians, and to expose the Indian people to state laws, state taxes, state police, state courts and state officials. B.A. at 13.

A similar statement also appears at 20 of appellant's brief wherein it is stated that an altering of the reservation boundaries would "strip the reservation Indians of their Federal and tribal rights to be free of State jurisdiction." B.A. at 20.

Evidently appellant has momentarily forgotten the remaining sections of 18 U.S.C. 1151 and a good part of over 50 years of United States Supreme Court Indian case law for these simply are not accurate statements.

With respect to the civil and criminal jurisdiction, it would be superfluous to cite all of the decisions which restrict the jurisdiction of the state and expound upon the presence of Federal and tribal jurisdiction over these areas.

With respect to programs and benefits, most Federal and tribal benefits have always been available to the allottees and their families so situated, notwithstanding the fact that the tribal and Federal agencies have for over 60 years considered Todd County to be *the* Rosebud Reservation. As far as appellee has been able to determine, these Federal programs need only be "on or near Indian reservations" according to the Code of Federal Regulations. The Sisseton-Wahpeton tribe presents a prime example of the extent of tribal and Federal programs that have continued to exist irrespective of the heretofore declared status of the Lake Traverse Reservation.

If appellant has been misled by one sentence appearing in the decision of the court below, the injury was to a large extent self-inflicted – the court simply said that "Congress, in effect, offered to allow Indians to exchange and take their allotments in what would continue to be Indian land so that they might continue to benefit from *all* of the programs that the government had on the reservation." A.A.1 at 71 (emphasis added). And to a limited extent, this was undoubtedly true. But neither the court below or appellee would ever maintain that the mere fact that the allotment would be situated outside the boundaries of the Rosebud Reservation would sever said allottee's

tribal relations or dependency upon the Federal government much less cause him to lose his "share in the benefits of those moneys since they would no longer be 'Indians belonging to and having tribal rights on the Rosebud Reservation' " as appellant has stated in regard to the proceeds of the land sales. B.A. at 18. Indeed, such a position would be in blatant contradiction to the Dawes Act of 1887 as implemented by subsequent legislation.

5. The "Preservation of Rights" [Benefits] Provision.

Article 5 of the original 1901 lump-sum cession agreement provided:

> It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement. S.Doc. 31, 57th Cong., 1st Sess. 42 (1901).

In the court below appellant's brief was founded upon the "crucial" preservation of rights clause deemed to be significant in *New Town, supra*. Appellee pointed out that the provision appeared word for word in Article 5 of the original 1901 lump-sum cession agreement which even appellant conceded would have diminished the reservation and that a "right" to a secure reservation with a fixed boundary in a lump-sum cession agreement to cede part of that reservation would seem to be a tenuous right at best. In effect the "bundle" agrument eventually destroyed itself.

In this appeal, appellant now questions (apparently) what precise effect an immediate ratification of the 1901 agreement would have had, but only two pages of its brief are devoted to this agrument. Appellee stands on the probative evidence of disestablishment presented throughout this brief and in addition notes that the "bundle of rights" argument was not deemed to be significant in *Condon, supra*, or *Feather, supra*, indeed was not even mentioned in the opinion.

In any event, at least appellant now argues with the terminology chosen by Congress and the clause is correctly referred to as the treaty *benefit* language for, as was pointed out to the court below, the terms "right" or "rights" do not appear anywhere within the text of the three Rosebud Acts. Therefore, if said provision is deemed significant it should be only in connection with the preservation of "benefits" discussed in the preceeding subsection. In this respect the essence of the provision can be traced back to the cession agreements of the mid1800's. But for the sophisticated agrument which was originally founded upon the presence of the "crucial" provision in the three final acts, your appellee would have hardly thought it worthy of any comment whatsoever and would have therefore treated it in the same manner as Congress did.

B. THE TRANSITION PERIOD: 1902-1904

It is during this time period, at least as far as the Rosebud Reservation is concerned, that Congress changed the type of arrangement it would use in acquiring Indian land. The agreement of 1901 was amended, and as such, finally emerged as the Act of 1904. In thecourt below, appellee agreed with appellant that as to the Rosebud Reservation, "the Gregory County Act would *establish* a *new* policy." B.P. at 30 (emphasis as in original). Appellee also commended appellant for its quotation from such an excellent source of legislative history as the House of Representatives Report No. 443 appearing at 29 of appellant's brief below:

> Both of these bills [i.e., both the House andSenate versions] present a new idea in acquiring Indian lands, and if this bill should be enacted into law it will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians and pay them therefor and then open the same to entry and settlement. . .
>
> This bill provides that the lands shall be disposed of under the homestead laws by the settler paying therefor and the proceeds paid to the Indians, and it is expressly provided by Section 6 of this bill that the United States shall in no manner be bound to purchase any portion of the land except the school sections, or dispose of the same except as provided, or to guarantee to find purchasers for said lands, it expressly stating that the intention of the act is that the United States shall act as trustee for the Indians in disposing of the lands and pay over the proceeds from the sale thereof only as the same are received. B.P. at 29-30.

But Appellee did not agree that this singular quotation could realistically be cited to support the proposition that it alone has either sufficient "legislative history" to "dispel" any confusion or cause such "ambivalence" to render the "language of the act subject to the rule. . .that doubtful expression in treaties and statutes dealing with Indian affairs must be resolved in favor of the Indians." B.P. at 31. This was especially so in view of the paragraph appearing on the very next page in the same report:

> There is no question but what the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a *corner of the reservation, which will be left compact and in a square tract and a reservation about equal in size to the Pine Ridge Reservation, in South Dakota.* H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904) (emphasis added).

Rather, the position of appellee was that this 1904 act did in fact diminish the Rosebud Reservation in precisely the same manner which would have occurred had the original 1901 lump-sum cession agreement been ratified. The position of appellee before this court remains the same. The following interrelated propositions will be utilized to support that position:

II. THERE IS NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE "NEW POLICY" WAS INTENDED TO AFFECT THE DIMINUTION WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

III. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE AMENDED 1901 CESSION AGREEMENT (1904 ACT) WAS INTENDED TO EFFECT THE SAME DIMINUTION WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

IV. THE DOCUMENTS AND STATUTES CONCERNED WITH GREGORY COUNTY AFTER THE PASSAGE OF THE 1904 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED

II. THERE IS NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE "NEW POLICY" WAS INTENDED TO AFFECT THE DIMINUTION WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

If the 1904 Act was not intended to diminish the Rosebud Reservation as the original 1901 lump-sum cession agreement would have, where in any of the contemporary documents is there any reference to this fundamental policy change? Appellant's brief below certainly did not contain any citations to support what would have to be referred to, at least as to the Rosebud Reservation, a rather drastic reversal in policy within a period of two years. Nor does appellant's brief to this Court.

Here, in the documents of this period, and not in the 1930's, 1940's or the 1970's, is where the metal of appellee's concept should be put to the test. Certainly, in the approximately 200 pages of materials specifically dealing with this particular reservation and the 1904 Act, there should have been one paragraph which would at least arguably support appellant's position. But it is not appellee's position that the absence of any evidence to support appellant's position should, of itself, be determinitive of the issue of what effect the 1904 Act had on the Rosebud Reservation--for there is ample evidence which should suffice to that end.

III. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE AMENDED 1901 CESSION AGREEMENT (1904 ACT) WAS INTENDED TO EFFECT THE SAME DIMINUTION WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

For Congress, Inspector McLaughlin, and the Indians, the only "new policy" was an amendment which represented a feasible solution to the opposition's appropriation argument. It was not in any way concerned with the diminution of the Rosebud Reservation which your appellee has established would have followed the ratification of the original 1901 lump-sum cession agreement and each of the following subsections butress this conclusion.

A. CONTINUITY

1. Brief for Appellant Below.

In the court below appellant tried to persuade the court that the presence of the entire text of the 1901 agreement could be explained away on the basis that it was Congress' first attempt to implement the new policy. For example, at 29 of appellant's brief below the following statement appeared: "The Gregory County Act incorporates this language verbatim, as it does the entire text of the 1901 agreement." B.P. at 29. Although appellee preferred to refer to the Gregory County Act as the amended 1901 lump-sum cession agreement for that is what the 1904 Gregory County Act was appellee agreed with appellant that the text of the agreement was there. But appellee did not agree that the presence of the entire text of the 1901 lump-sum cession agreement (except for the 1901 appropriation provisions) could be rationalized away as appellant attempted, by merely stating that "certainly Congress can be excused from employing language suggested by another and echoing an abandoned policy in its very first attempt to implement a new policy." B.P. at 30.

Nor did appellee agree with appellant that "Congress exhibited an understandable ambivalence and [sic] confusion in the Gregory County Act over exactly what language would be most appropriate to express the workings of the new land acquisition policy"; that appellant's isolated quotation of Senator Burke's report was sufficient "legislative history" to dispel any "confusion" or "ambivalence",[7] or that such ambivalence "renders the above language of the act" [the entire 1901 agreement, as incorporated??] subject to any rule of construction resolving anything in favor of the Rosebud Sioux Tribe. B.P. at 31. Rather, it was appellee's position that Congress only amended the 1901 agreement to the extent necessary to implement the new policy and did not intend to change the other aspects of the agreement in any way. The court below did not think appellant's argument was persuasive.

7. The merits of the plaintiff's selected legislative history were noted in the introduction of this brief.

In this Court appellant has adopted a new argument, an argument which your appellee would submit as even more untenable than the ones submitted below. Its position is simply that the whole 1904 Act was a dirty trick:—"The format was a camouflage" "a pretense" "only a dressing, a front to give the statute the face of an agreed transaction," "the new version (S. 7390), followed the pretense of ratification of the September 14, 1901 agreement. . ." B.A. at 18, 31, 43. Appellant's consent argument has been disposed of at , *supra*, and this "camouflage" argument is so utterly without foundation that it does not even merit rebuttal. The format of the 1904 Act was the result of the way the new version was submitted. For example, the format of the bill itself, was introduced by Congressman Burke to the House on January 30, 1904, was:

> The Clerk read the *bill*, as follows: A bill to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provision to carry the same into effect.
>
> [entire text of *1901* Agreement]
>
> Therefore,
> Be it enacted, etc., that the said agreement be and the same hereby is, accepted, ratified and confirmed as *herein* amended and modified.
>
> [1901 Agreement as amended and modified]
>
> 38 Cong. Rec. 1422-1423 (1904).

It is appellee's position that the mere fact that Congress did use not only the language of an "abandoned" policy, but the entire text of an "abandoned" agreement intended to disestablish a portion of the Rosebud Reservation, would in and of itself, seem to be indicative of a continuity of policy as amended, and not as appellant would have this court believe, congressional incompetency or some dirty trick.[8]

And on this same point the Court will also have to excuse President Roosevelt, for as appellant stated below:

8. See Note 4, *supra*.

He employed language in that proclamation which nearly duplicated the language which Congress used in the Act of April 23, 1904. From this language, one might infer that Roosevelt did contemplate a diminished Rosebud Reservation. B.P. at 25.

2. The Senate and House Documents. Even the Senate and House Reports on the 1903 and 1904 acts, which are discussed in detail in other parts of this brief, not only treat the original and amended 1901 agreement in this same fashion, but also amend and make a part of each report, several of the 1901 documents in their entirety.

3. The Congressional Record. If one were to choose almost any page in the Congressional Record before the amendment of the original 1901 lump-sum cession agreement and compare the terminology appearing therein to that used after the agreement had been amended, he would note that the Congressmen continued in all instances to refer to thesubject matter with which they were concerned in exactly the same descriptive terminology. Perhaps more than any other single passage in the Congressional Record evidencing this continuity is Congressman Burke's explanation of the differences between the two bills to the House:

> Mr. BURKE. Mr. Speaker, this bill provides for the opening to settlement of 416,000 acres of land, *now* a portion of the Rosebud Reservation, in South Dakota, being that portion of the reservation in Gregory County. In 1901 a treaty was entered into with the Rosebud Indians on the part of the United States, by which the Indians agreed to sell to the Government this land for $2.50 per acre. That treaty was transmitted to Congress, and because of the fact that it provided that the Government should pay for the lands outright and then take the chance of theTreasury being reimbursed by disposing of the lands to settlers, it never got further than through the Committee on Indian Affairs, which unanimously reported it favorably. It was never given consideration in the House.
>
> Toward the concluding days of the last session of Congress a new bill was prepared, substantially as this bill now provides, and that bill provided that the lands should be ceded by the Indians to the Government, disposed of to settlers under the provisions of the homestead law, and price to be fixed at $2.50 an acre, as was provided inthe original treaty. That bill did not receive consideration in the last Congress because of lack of time, but during the summer that bill was submitted to this tribe of Indians for their acceptance, and forty-eight more than a majority consented to accept the terms of that bill. This bill is substantially the same as the bill which I have just referred to, except that the committee, in view of a suggestion made by the Commissioner of Indian Affairs, in which he said he had no objection to the passage of this bill provided the Indians were insured as as much money as they would have received under the treaty, instead of fixing the price at $2.75, which was provided in the bill submitted to the Indians during the summer, fixed the price at $3 per acre for all lands taken within the first six months and $2.50 for all lands taken thereafter.
>
> It was thought by the committee that this would certainly insure to the Indians as much money as they would have received under the original treaty, and, in my judgment, it insures their receiving considerably more. There is no opposition to the passage of this measure, so far as I know. The Indian Bureau and the Secretary of the Interior have both approved it, providing we fix a price ,as we have done, that will insure

> the Indians as much money as they would have received under the original treaty. The Committee on Indian Affairs has considered it fully and at length and has spent several meetings of the full committee considering it. The report of the committee is unanimous. I do not care to occupy the attention of the House in making any extended remarks on the bill, and unless some gentleman desires to ask some questions I will reserve the balance of my time. 38 Cong. Rec. 1423 (1904) (emphasis added).

In this connection, it is also interesting to note that both appellant and some of the recent opinions seem to attach some sort of special significance to the "opening" or "opened reservation" terminology and in some manner equate this terminology with the new trustee-homestead provision which supposedly "opened the reservation without diminishing the size or boundaries of that reservation." Yet, at least with respect to the Rosebud Reservation, this simply is not the case. This "opened" reservation terminology was used by nearly every member of Congress participating in the debates from the first day the original 1901 lump-sum cession agreement was introduced:

> Senator GAMBLE. . . .It has long been the policy of the Government to *open* the Western reservations. . . .Within the limits of the land proposed to be *opened* to settlement there are upward of 450 Indian allottees, and the settlers who take these lands will be obliged to assume the responsibilities of the local community practically unaided by the Indians, and to bear largely all the responsibilities that have heretofore been borne by the Federal Government. . . .
>
> Mr. STEWARD. . . .In this very case the committee had much doubt whether the land was worth $2.50 an acre; but they finally consented to report the bill, because the Senator from South Dakota insisted that it would be detrimental and ruinous to the State of South Dakota to have settlement there tied up in this way, and that these lands *ought to be opened*. . . . .
>
> Mr. PLATT. . . .It is true that several years ago more than 10 years ago I think in *opening Indian reservations*, we paid large and extravagent prices for the land to the Indians. . . .35 Cong. Rec. 3187, 3188 (1902) (emphasis added).

but also appears throughout the congressional documents and debates before the turn of the century in connection with other acts conceded to have disestablished portions of the reservation — for example the 1889 Act which disestablished portions of the Great Sioux Reservation and the 1891 Fort Berthold Act.

B. THE OFFICE OF INDIAN AFFAIRS.

As further indication that the trustee-homestead amendment was not intended to affect the diminution aspect of the original 1901 lump-sum cession agreement which appellee has established, reference is made to the manner in which the Office of Indian Affairs handled the amendment. Inspector McLaughlin's new instructions simply explained it and then stated:

It is not deemed necessary herein to give you any definite instructions as to the form of the agreement and the manner of its execution inasmuch as you are thoroughly familiar with these features of the subject. *Attention* is invited in this connection, however, to Department *instructions* to you dated *March 21, 1901*, in connection with the negotiation of the former agreement. Letter from W.A. Jones, Commissioner of Indian Affairs to Inspector James McLaughlin, June 30, 1903 (emphasis added).

Inspector McLaughlin explained the trustee-homestead amendment to the members of the Rosebud Sioux Tribe in the same manner:

I am here to enter into an agreement which is similar to that of two years ago, except as to the manner of payment. . . ." C.T. at 21, July 25, 1903.

. . .the agreement which I submit for your consideration is similar in every respect to that of two years ago, except you will have to wait for the sale of the land to receive your money. . . . C.T. at 37, July 25, 1903.

The objections to the former agreement was not on account of the price, but to the manner of payment. . . . C.T. at 50, July 25, 1903.

There has been a sentiment growing in Congress for a number of years past, and is now stronger than ever against paying Indians for ceded land direct from the U.S. Treasury. That is what is referred to in my letter of instructions, which I read you, as being a new departure in the manner of disposing of the surplus lands of Indian reservations, and instead of paying Indians direct from the U.S. Treasury as heretofore for their surplus lands, they will be paid from the proceeds of the sale of lands ceded; the Department thus acting as trustee for the Indians, and the Interior Department having charge of the lands will dispose of them in such a manner as will secure to the Indians the highest price obtainable. This is the new departure referred to, and I believe, my friends, that no treaty will ever again be made with the Indians, by which they will receive a lump-sum consideration for the tract ceded. . . .I am here to enter into a new agreement, from which you will receive as much for your lands as the agreement of two years ago provided, but the manner of disposing of it is different. . . .The Government collects from the homesteader and pays it over to you. . . .*You will still have as large a reservation as Pine Ridge after this is cut off*. . . . C.T. at 5, 12, 22, July 30, 1903 (emphasis added).

C. THE SCHOOL LAND PROVISION

In the court below your appellee pointed out the fact that the only treatment this school land provision had received in any of the briefs as of that date was a mere acknowledgement of its presence. For example, appellant below merely listed the provision in the "Lands exempted from sale and/or disposition" and "appropriations" sections of its brief. B.P. at 31-33, 41. But for the reasons stated in the Congressional Record and the Senate and House documents for its necessary inclusion in the original and amended 1901 agreement, no other treatment would probably have been warranted. When the provision is examined in light of these reasons, however, it is your

appellee's position that it assumes such an added degree of significance as to constitute one of the most enlightening provisions to be found in any of the acts.

As appellee has discussed at 12, *supra*, on the first day the original 1901 lump-sum cession agreement was presented on the floor of the Senate for ratification, Senator Gamble immediately proposed, and the Senate immediately agreed to, without discussion, the school land provision. 35 Cong. Rec. 3187 (1902).

As Senator Gamble explained to the Senate:

Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. *This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the lands restored to and became a part of the public domain.* This would withdraw about 29,000 acres of these lands and would leave 387,000 acres to be opened to settlement, which would be affected by the proposed amendment. Cong. Rec., *supra* (emphasis added).

The provision of the enabling act to which Senator Gamble referred provided:

Nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act *until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.* Act of February 22, 1889, ch. 180, 25 Stat. 676 (emphasis added).

The Committee of Indian Affairs first suggested the school provision when the bill was pending before it, even though Senator Gamble felt that the provision itself was superfluous as the grant to the state would become operative without further legislation when, in his words, the "*reservations were opened, as in this case, and became a part of the public domain. . . .*" 35 Cong. Rec. 4856 (1902) (emphasis added).

Certainly Congress, at the time of this debate, had intended the 1901 agreement to disestablish a portion of the Rosebud Reservation, and so the "public domain" and "extinguished reservation" concept is understandable. After all, Congress was concerned with the original 1901 lump-sum cession agreement which your appellee has established would have had this effect on the Rosebud Reservation. In other words, at least as far as the Rosebud Reservation is concerned, Congress had not as yet, as appellant below stated, abandoned this policy in favor of the "new" policy, i.e. the trustee-homestead amendment.

But why is this school land provision, founded as it is upon a provision made operative *only*

when " the reservation shall have been extinguished and such lands restored to, and become a part of, thepublic domain," still present in the final act representing the "new" policy which purportedly did not diminish or extinguish reservations? And what is Congressman Burke doing explaining the school land provision to the House of Representatives on January 30, 1904, *after the adoption of the new policy*, in not only the same descriptive terminology of the old policy which appellant below argued had been abandoned, but also in terms of the same diminutive or extinguishing concept the 1901 agreement would have had on the reservation!

> Mr. FINLEY: Mr. Speaker, I observe that in section 4, reserving school lands, it is provided that the government pay for those lands. Is that the usual appropriation that is put in all bills of this character?
>
> Mr. BURKE: I am glad that the gentleman has asked me that question. I would state that under the enabling act under which the State of South Dakota was admitted to the Union it was provided that sections 16 and 36 in said State should be reserved for the use of the common schools of that State, and *it further provided that as to the lands within an Indian reservation the provisions of that grant would not become operative until the reservation was extinguished and the land restored to the public domain*. That enabling act was passed by Congress on the 22nd day of February, 1889. In March of that same year Congress ratified a treaty with the Sioux Indians in South Dakota for the cession of something like ten or eleven millions of acres of land, and made an express appropriation, in accordance with provisions of the enabling act, to pay outright of the Treasury the money for sections 16 and 36 of that land at the price stipulated for in the treaty.
>
> Mr. FINLEY: Then, as I understand the gentleman, he bases the wisdom or equity for this provision upon the enabling act admitting South Dakota into the Union.
>
> Mr. BURKE: Yes.
>
> Mr. FINLEY: And not otherwise?
>
> Mr. BURKE: No. 38 Cong. Rec. 1423 (1904) (emphasis added)

Precisely the same underlying reason for the inclusion of this school land provision in the final act, namely that the act would extinguish that portion of the reservation and hence make operative the enabling act, is also given in all of the House and Senate Reports submitted *after* the adoption of appellant's "new" policy:

> The bill also provides that sections 16 and 36 or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and an appropriation of $90,000 is made for this purpose. This provision is in conformity with the guarantee given to the State of South Dakota by Congress in the enabling act, which provided that any reservations open to settlement subsequent to the admission of the State into the Union, that sections 16 and 36 would be reserved and ceded to the State for school purposes. H.R. Rep. No. 3839,

> 57th Cong. 2d Sess. 2 (1903).
> The bill also provides that sections 16 and 36, or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and an appropriation of $90,000 is made for this purpose. This provision is in conformity with the guarantee given to the State of South Dakota by Congress in the enabling act, which provided that in any reservations open to settlement subsequent to the admission of the State into the Union, that sections 16 and 36 would be reserved and ceded to the State for school purposes. S. Rep. No. 3271, 57th Cong. 2d Sess. 2 (1903).
>
> Section 4 of the bill provides that sections 16 and 36, or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and section 5 provides for an appropriation of $90,000 for this purpose. This is in conformity with the guaranty given to the State of South Dakota by admission of the State into the Union sections 16 and 36 would be reserved and ceded to the State for school purposes. H.R. Rep. No. 443, 58th Cong., 2d Sess. 2 (1904).
>
> Section 4 of the bill provides that section 16 and 36, or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and section 5 provides for an appropriation of $90,000 for this purpose. This is in conformity with the guaranty given to the State of South Dakota by Congress in the enabling act, which provides that in any reservations opened to settlement subsequent to the admission of the State into the Union sections 16 and 36 would be reserved and ceded to the State for school purposes. S Rep. No. 651, 58th Cong., 2d Sess. 2 (1904).

The connotation of the "open to settlement" terminology has been discussed at 23, *supra*

Appellant's arguments, both in the court below and in this Court, regarding the school provision have been discussed and disposed of at 24, 25, 26, *supra* In addition thereto appellee would note that irrespective of what equitable interest the members of the Rosebud Sioux Tribe may have retained until the proclamation opened the land to settlement and irrespective of what precise moment said lands were actually and technically restored to the public domain, the import of the Congressional Record and the Senate and House Reports *specifically concerned with the Rosebud Reservation and this section of the 1904 Act is totally clear and unambiguous: that portion of the Rosebud Reservation affected by the 1904 Act was being disestablished by the 1904 Act.*

D. THE FINAL REPORTS: SENATE REPORT NO. 651 AND HOUSE REPORT NO. 443

The legislative history of each of the three Rosebud Acts contains so much material that is specifically and blatantly contrary to the undiminished reservation theory that even appellant can not devise or structure a plausible argument to explain it away. One such example is the final reports on the 1904 Act.

Senate Report No. 651 and House Report No. 443 are one and the same, as the Senate Committee on Indian Affairs deemed the subject matter of the measure to be so "fully covered" (S.Rep. *supra* at 1) by House Report No. 443, they adopted it in its entirety. The report and appended materials consist of some 12 pages that relate, in detail, the history of the Gregory County Act. Although appellee deems the entire report to be extremely significant and has in fact discussed certain aspects of it elsewhere in this brief, only two areas will be examined at this point. Keeping in mind that the general purpose of this subsection was to show that Congress never intended that the trustee-homestead amendment would in any way affect the diminution of the Rosebud Reservation which appellee has established would have occurred had the original 1901 lump-sum cession agreement been ratified, your appellee notes and deems significant the following paragraph:

> There is no question but what the Indians have no use for the land that is proposed tobe ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, *which will be left compact and in a square tract and a reservation about equal in size to the Pine Ridge Reservation, inSouth Dakota.* S. Rep., *supra* at 3 (emphasis added).

This paragraph, especially when considered in connection with not only the tenor of the Commissioner of Indian Affairs testimony before the House Committee, but also the specific reply he made when asked about the advisability of consent (i.e., "If you wait for their consent in these matters, it will be fifty years before you can do away with the reservations.") (S. Rep., *supra* at 4-5 [emphasis added]) which was also reproduced in the report proper,[9] not only deals with the precise effect the 1904 Act was to have on the Rosebud Reservation, but also serves to put the issue in what appellee would term a proper historical perspective.

Both reports represent the final word of the Senate and House Committees on Indian Affairs, and in effect, of Congress itself.

The House passed the bill on February 1, 1904, after a short explanation by Congressman Burke, the significant portion of which has already been discussed inthis brief. On April 18, 1904, the entire report was first read by the Secretary, and the bill passed the Senate without any discussion whatsoever.

Appellant has failed to address any portion of its brief, either in the court below or in this

9. By "report proper," your appellee means that portion of the report exclusive of the appended material.

Court, to this unequivocal and very significant report to Congress of what was to be a new Rosebud Reservation.

IV. THE DOCUMENTS AND STATUTES CONCERNED WITH GREGORY COUNTY AFTER THE PASSAGE OF THE 1904 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED

One would logically assume that if, *after* the 1901 agreement had been amended to include the trustee-homestead provision, a portion of the reservation was *still* to be "cut off," "extinguished," and "restored to the public domain" and that portion remaining to be left "compact and in a square tract" and "still as large as" or "about equal in size to the Pine Ridge Reservation," as Inspector McLaughlin, Congressman Burke, Senator Gamble, and the language and provisions of the act and reports indicated, there should be some confirmation of this diminutive effect in documents and statutes concerned with Gregory County and the Rosebud Reservation *after* the act had been passed and proclamation issued. C.T. at 22 (1903); 38 Cong. Rec. 1423 (1904); H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904). (Cited sources describing the effect of the 1901 agreement *after* it had been amended to include the trustee-homestead provision i.e., the 1904 Act.)

The appellee submits that, in its *entirety*, the judiciary could not expect a more *relevant, consistent, clear, immediate and unequivocal* confirmation of this sort than the 1905 "extension" statute and peripheral materials concerned therewith.

1. 1905 Extension Statute

   a. S.Rep. No. 2760, 58th Cong., 3rd Sess. 1 (1905):

> The Committee on Public Lands, to whom was referred the bill (S. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which *were heretofore a part of the Rosebud Indian Reservation* within the limits of Gregory County, S. Dak., having had the same under consideration, beg to leave to report the bill back with the recommendation that it be amended, and that as amended it do pass. . .
>
> The portion of the Rosebud Indian Reservation which was subject to the legislation provided by the act of April 23, 1904, was thrown open for settlement by the proclamation of the President of the United States under date of May 13, 1904. . .(emphasis added).

   b. H.R. Rep. No. 4198, 58th Cong., 3rd Sess. 1 (1905):

> The Committee on the Public Lands, to whom was referred the bill (S.5799) to

provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were *heretofore a part of the Rosebud Indian Reservation* within the limits of Gregory County, S. Dak., having had the same under consideration, beg leave to report the bill back with the recommendation that it do pass.

The portion of the Rosebud Indian Reservation which was subject to the legislation provided by the act of April 23, 1904, was thrown open for settlement by the proclamation of the President of the United States under date of May 13, 1904. . . . (emphasis added).

c. 39 Cong. Rec. 1578 (1905) (remarks of Senator Gamble on S. 5799, on Jan. 30, 1995):

Extension of Time to Homestead Settlers.

Mr. GAMBLE. I ask unanimous consent for the present consideration of the bill (S. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands *which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County*, S. Dak. . . (emphasis added).

d. Act of February 7, 1905 (S. 5799) ch. 545, 33 Stat. 700: An Act To provide for the extension of time within which homestead settlers may establish residence upon certain lands which were *heretofore a part of theRosebud Indian Reservation within the limits of Gregory County, South Dakota*

> Be it enacted. . .. That the homestead settlers on the lands which were *heretofore a part of the Rosebud Indian Reservation* within the limits of Gregory County, South Dakota, opened under an Act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provisions to carry the same into effect, approved April twenty-third, nineteen hundred and four. . .be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened. . (emphasis added).

e. 33 L.D. 408 (1905):

Instructions

Department of the Interior,
General Land Office
Washington, D.C., Feb. 9, 1905

Register and Receiver,

Chamberlain, South Dakota. . . .

Gentlemen: The Act of February 7, 1905, provides –

That the homestead settlers on the lands which were *heretofore a part of the Rosebud Indian Reservation* within the limits of Gregory County, South Dakota, opened under an act entitled " an Act to ratify and amend an agreement with the Sioux tribe of Indians of theRosebud Reservation. . . ." be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened and filed upon until the first day of May, anno Domini nineteen hundred and five. . . .

You will see that as to lands in the *former* Rosebud Reservation. . . . this act is given effect in your office as to all entries made of such lands prior to

November 1, 1904. W.A.Richards, Commissioner

Approved: E.A. Hitchcock,
Secretary
(emphasis added).

The court below cited the above materials as a "clear indication," a "clear expression," that Gregory County had ceased to be considered in the "congressional mind" as reservation and "that the Congress of the United States considered the reservation nature of Gregory County extinguished." A.A.I. at 46-47.

Although appellant has quoted the *Mattz* opinion to this court as follows: " '[S]ubsequent legislation usually is not entitled to much weight in construing earlier statutes.' *Mattz v. Arnett,*" (B.A. at 59) to support its assertion that "the subsequent enactments are inconsistent, inconclusive and for that reason not a reliable indicator of Congressional intent," appellee is confident that this Court is completely aware as was the lower court that the complete statement of the United States Supreme Court in *Mattz* was "although subsequent legislation usually is not entitled to much weight in construing earlier statutes, *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170, (1968), *it is not always without significance.*" 392 U.S. 157, 170 (emphasis added). Other miscellaneous documents which also attributed this same diminution to the 1904 Act. (See Appendix at 86, 87).

As appellee stated to the court below, this list of "former" references is not and was not intended to be complete in the sense that it includes all references of a later date concerned with the Gregory County opening. Nor is it intended that because of the "former" references such an intention must be "imputed" back to the 1904 Congress. Rather, the references are merely intended as a confirmation that the diminutive effect attributed to the 1904 Act before passage was recognized after the act was effective. [10]

The list is therefore to be considered only as additional support for what was in the court below and still remains appellee's primary contention in this Court: that the legislative history and the text of the 1904 Act, considered together and in their entirety, are sufficient to show that the 1904 Act was intended to diminish the Rosebud Reservation. The court below used one of the above references for precisely this purpose when at page 24 of its opinion it stated that the transcript "adds weight" to its conclusion that the 1904 Act diminished the Rosebud Reservation and cited

Inspector McLaughlin. . . .There is no railroad running over any portion of the

10. 1907 and 1910 confirmation sections are intended to be equally within the purposes and limitations stated in this paragraph.

> Rosebud Reservation, none within the boundaries of your reservation. That railroad in Gregory County has not yet come across your reservation boundary, but should it come into your reservation, you would receive pay for its right of way. Any of the Indians who may live in Gregory County whose allotments have been crossed by that railroad, have, or will receive pay for the privilege of crossing their allotments. So you need not worry about that , my friends. "Dec. 14, 1906, *Rosebud Agency Hearing* by James McLaughlin, U.S. Indian Inspector, page [5]." A.A.I at 51.

Appellant has jumped all over the court below and devoted over two pages of its brief to show that:

> The quotation set out in the opinion is intended to show that when McLaughlin in 1906 said that a railroad in Gregory County 'has not yet come across your reservation boundary***, it meant that McLaughlin considered the 1904 Act portion of Gregory County to be outside of the reservation and therefore the statute meant the same thing. The conclusion is not supported by the record or by McLaughlin's complete statement, . . .
>
> The record does not show whether, by 1906, an additional rail line had been built into the 1904 Act portion of Gregory county.
>
> McLaughlin's statement, read in context, does not support the trial court's conclusion that 'McLaughlin's assumption was that Gregory County was no longer a part of the Rosebud Sioux Reservation.' (B.A. at 52,52.)

asserting that this was "another example of the inappropriate use" of later materials to show "1904 Act intent." B.A. at 52.

In the first place the court below explicitly stated the reference quote only "adds weight" to the court's conclusion that the 1904 Act had in fact diminished the Rosebud Reservation. A.A.I at 50.

Secondly, and more importantly, the *record does show* and shows *clearly, contrary* to the assertions of appellant, that, by 1906, an additional rail line had been built into the 1904 Act portion of Gregory County. On page 20 of appellee's brief below, immediately after Inspector McLaughlin's statement the following documentation of that fact appears:

> 6. YESTERDAY AND TODAY: A HISTORY OF THE CHICAGO AND NORTHWESTERN RAILWAY SYSTEM, at 133 (1910). The following quotation from the annual report for fiscal year *1906* appears therein:
>
> > The company had also undertaken the construction of an extension from Bonesteel, South Dakota to Gregory, South Dakota, a distance of 25.93 miles, and would be complete during the ensuing fiscal year. This extension will *pass through Gregory County*, which embraces that portion of the Rosebud Indian Reservation *opened to settlement in 1904*, and will terminate near the *present* eastern boundary of that

> reservation (emphasis added).

It would thus appear that the only "inappropriate use" of material would be the two pages of appellant's brief devoted this wholly unsuccessful attempt to discredit the court below.

1907 ACT [11]

If appellee's position as to the effect of the 1904 Act on the Rosebud Reservation is correct, the materials surrounding the 1907 Act should not only independently support this position but should also indicate a similar effect was intended by the 1907 Act itself. Since the 1907 documents enable one to view the effect of the homestead acts on the Rosebud Reservation both retrospectively and prospectively; they will be analyzed from that vantage point. The format will consist of the same three interrelated subheadings used in the discussion of the Gregory County Act.

I. THERE IS STILL NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE TRUSTEE-HOMESTEAD AMENDMENT WAS INTENDED TO AFFECT THE DIMINUTATION WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM AGREEMENT

The pillar of appellant's new policy, the trustee-homestead amendment, had been in effect for three years on the Rosebud Reservation and was about to be implemented again. Yet not one paragraph appears in any of the contemporary documents that clearly supports its concept of a reservation. Even in light of the fact that three years had passed since the "new policy" was applied to the Rosebud Reservation, one would expect at least some sort of casual remark or other manifestation from someone.

II. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE 1907 ACT WAS INTENDED TO EFFECT A SIMILAR DIMINUTION TO THAT WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT AND WHICH DID FOLLOW THE 1904 ACT

A. CONTINUITY

If there is one striking characteristic that permeates all of the Rosebud materials from the

11. Act of March 12, 1907, 34 Stat. 1230–all of Tripp County and a portion of Lyman County.

conception of the original 1901 lump-sum cession agreement through thepassage of the 1910 Act, that characteristic is continuity: A continuity of terminology, procedure, personnel, and most importantly, policy.

1. Terminology. The "cession" and "open" terminology continues to appear throughout the documents of the period and is used interchangeably with and equated to the "sale and dispose of" terminology. In one paragraph reference is made to "the sale of that part of Reservation located in Tripp County" and in the next to the disposal of the "land ceded," *ad infinitum*. Letter from F.E.Luepp, Commissioner of Indian Affairs to Inspector James McLaughlin, December 5, 1906.

2. Procedure. The Secretary of the Interior again requested the Office of Indian Affairs to "prepare instructions" for Inspector McLaughlin to enter into "negotiations with the Rosebud Indians for the *cession*" of certain land in South Dakota and Inspector McLaughlin was thereby detailed in the precise same manner as in 1901. Letter from F.E. Leupp, Commissioner of Indian Affairs to the Secretary of the Interior, December 5, 1906 (emphasis added). The instructions referred to fair terms, "similar to those in the disposal of the ceded lands in Gregory County." Letter to Inspector McLaughlin, *supra*. Inspector McLaughlin explained the purpose of his visit in the same manner: "I am here under orders of the Secretary of the Interior to submit to you a proposition for the cession of your surplus unallotted land in Tripp County." A.A.III, doc. 19 at 1. As in 1901, an agreement was reached wherein a majority of the members of the tribe agreed to "cede, grant, and relinquish to the United States all claim, right, title and interest in and to all that part of the Rosebud Indian Reservation lying. . ." S. Rep. No. 6831, 59th Cong., 2d Sess. 1 (1907). Article II of the agreement provided that:

> In consideration of the lands ceded and relinquished by Article I of this agreement, the U.S. stipulates and agrees to dispose of the same, as hereinafter provided, under the provisions of the homestead and townsite laws, or by sale for cash, and shall be opened. . . . S. Rep., *supra*

If the trustee-homestead policy was inconsistent with the "cede, grant, and relinquish to the United States all right, title and interest in" policy, as appellant still maintains, the Secretary of the Interior, the Office of Indian Affairs and Inspector McLaughlin certainly were not aware that such a distinction should apply to the Rosebud Reservation.

The Office of Indian Affairs and the Secretary of the Interior attempted to make the legislation conform with the expectations of the Indians. Both recommended that the agreement be ratified with only those changes necessary to make it effective. S. Rep., *supra* at 4. On February 18, 1907,

the Senate Committee on Indian Affairs concurred and Senate Report No. 6831 was submitted with the agreement basically intact. S. Rep., *supra*. However, at approximately the same time a bill substantially in theform of the final act had already passed the House. So the very next day the Senate Committee on Indian Affairs adopted the House bill, which was not in the "form" of the agreement, and the House report, which only appended the agreement. S. Rep. No. 6838, 59th Cong., 2d Sess. (1907). But for the fact that the other version had already passed the House, the *1907* Act could very well have ended up in the same form as the Gregory Act–a form containing the terminology of and representing a policy which according to appellant had long since been abandoned on the Rosebud Reservation. [12]

In any event, the fact that an agreement containing this "old" terminology was appended to and made part of theSenate and House reports is, in and of itself, significant. In addition, many of the provisions of the agreement were simply paraphrased and made a part of certain sections of the final act. [13]

3. Personnel.Many of the individuals responsible for the Rosebud legislation in 1907 were the same individuals that were responsible for the 1904 legislation. For the most part they were thoroughly familiar with the history of the Rosebud legislation, some even from the time of the 1901 agreement. This is additionally persuasive in light of appellant's citation that " 'It is the sponsors that we look to when the meaning of the statutory words is in doubt.' " B.A. at 59. In this respect, the references to and provisions of the acts which are inconsistent with the continued existence of certain portions of the Rosebud Reservation become even more of an anomaly. See Note 4, *supra*.

---

12. Perhaps the reason why the House did not ratify the agreement *in toto* was that it had to be amended. In such a case, Inspector McLaughlin has succinctly stated in the very last paragraph of his report that:

> I desire to add that quite a number of the Indians before signing the agreement expressed themselves as fully concurring in all its provisions, but wanted it distinctly understood that should the agreement fail or ratification just as it was written, they did not wish their names transferred to appear as concurring in H.R. bill 20527, 59th Congress, 2d Session, or any other bill of a similar character, which they imagined was done with their signatures to the unratified agreement of September 14, 1901, when Gregory County lands were opened by the Act of April 23, 1904. Letter from Inspector James McLaughlin to the Secretary of the Interior, February 12, 1904.

13. The articles in the agreement were prefaced with "It is further agreed. . ." and "It is understood. . . ." In all instances the remainder of the provisions were then retained *in toto*. For example, compare the school land provision in the agreement and the final act. In essence, as Congressman Burke stated, the whole act was "substantially in accordance with an agreement which has just been made with the Indians. . .." 41 Cong. Rec. 3104 (1907).

In all instances, the 1907 bill and agreement were referred to as being "the same as" or "in line with" or substantially "similar to" the 1904 Act. C.T. at 31 (1906); 41 Cong. Rec. 3104 (1907); Letter to Inspector McLaughlin, *supra*. And the 1904 Act was consistently referred to by these men in such a manner as toleave little doubt that Gregory County was simply no longer considered to be a part of the Reservation. For example, there is Inspector McLaughlin's comment about the railroad set forth at 20, *supra*, and also the continual reference to Tripp County, not Gregory County, as *the* eastern part of the Reservation

> High Pipe: The best land we have is in *the eastern part* of our reservation, Tripp County. C.T. at 8 (1906) (emphasis added).

The agreement itself, the House and Senate Documents, and the Congressional Record also support this conclusion:

> cede, grant, and relinquish to the United States all claim, right, title, and interest in and to *all that part of the* Rosebud Indian Reservation lying south of the Big White River and *east*. . . .S. Rep. No. 6838, 59th Cong., 2d Sess. 4 (1907) (emphasis added).

> The purpose of this bill is to authorize the opening and sale of that portion ofthe Rosebud Reservation in South Dakota known as Tripp County, and it affects *all that portion of the reservation east* of range 25 of the fifth principal meridian south of the Big White River, and embraces about 1,000,000 acres.
>
> In the second session of the Fifty-eighth Congress a law was passed authorizing a sale of so much of this same reservation as *was* located in Gregory County, the tract affected being about one-half the area embraced in the tract affected by the pending bill and lying immediately adjoining and east of Tripp County. H.R. Rep. No. 7613, 59th Cong., 2d Sess. 1 (1907)(emphasis added).

> The purpose of this bill is to authorize the opening and sale of that portion of the Rosebud Reservation in South Dakota known as Tripp County, and it affects *all that portion of the reservation east* of range 25 of the fifth principal meridian south of the Big White River, and embraces about 1,000,000 acres.
>
> In the second session of the Fifty-eighth Congress a law was passed authorizing a sale of so much of this same reservation as *was* located inGregory County, the tract affected being about one-half the area embraced in the tract affected by the pending bill and lying immediately adjoining and east of Tripp County. S. Rep. No. 6838, 59th Cong., 2d Sess. 1 (1907) (emphasis added).

But for the discrepancy in acreage, it otherwise appears that if appellant's theory of an undiminished reservation is correct, Congress would be reselling and reopening that same portion of the Rosebud Reservation that had been opened and sold in 1904! Fortunately for the homesteaders and allottees in Gregory County, Gregory County was not a part of the Rosebud Reservation in *1907* and as the material in the next sections indicate Tripp County would soon be similarly located.

B. THE CENTRAL THEME

The three sources cited below are an example of what your appellee has attempted to stress throughout this entire section: that the central theme present in all of the Rosebud documents of this period is a concept of a reservation already diminished by one act, and soon to be diminished by another.

1. Commissioner of Indian Affairs. On December 15, 1906, F.E. Leupp, the Commissioner of Indian Affairs, submitted a 12 page report to the Secretary of theInterior on a bill that was them pending to dispose of that part of the Rosebud Indian Reservation in Tripp County, South Dakota. On the last page therein, he stated in simple and concise terms that:

> I have heretofore said in substance that, in my judgement, it is a mistake for Congress to direct the *restoration of the surplus lands* of an Indian Reservation *to the public domain* without first referring the question to the Indians. . . .Letter from F.E. Leupp, Commissioner of Indian Affairs to Secretary of the Interior, December 15, 1906 (emphasis added).

If the presence of the trustee-homestead provision in the Rosebud legislation was inconsistent with the restoration of lands to the "public domain," and hence inconsistent with the doing away with reservations, someone certainly should have communicated this information to the Commissioner of Indian Affairs. In addition, appellee would submit that the probative value of statements such as this is enhanced by the fact that this Commissioner was not a novice in these matters. Indeed, this is the same Commissioner who used the "doing away with reservations" terminology *after* the adoption of the trustee-homestead provision while testifying before the House Committee on Indian Affairs in *1904*, which was included, along with his report on the final draft on the 1904 Act, in both the 1904 Senate and House Reports.

2. The School Land Provision. Section 6 and 7 of the 1907 Act specifically provided that certain lands granted to the state be paid for by the Federal Government. The members of the House and Senate who were not as familiar with the Rosebud legislation as others more directly involved, were *consistently* and in all instances given the same explanation for this appropriation. A portion of the reservation would be extinguished by the 1907 Act (Tripp County), as portions thereof had been extinguished before, and a section of the enabling act required in such cases that land then be granted to the state. When Congressman Burke presented the bill to the House the following exchange took place:

> Mr. Finley. Does not the gentleman think that the State of South Dakota should have

land for school purposes, as is provided in the bill, and that the Government should pay for the land?

Mr. Burke of South Dakota. I will answer that question by stating that in at least six different instances since South Dakota was admitted into the Union Congress has made an appropriation and paid for the school sections under the *guaranty that was given* to the State when we came into the Union.

Mr. Finley. Why is that where certain sections have been allotted or patened the Government is called upon to pay for sections 16 and 36?

Mr. Burke of South Dakota. That refers to sections that have been allotted to the Indians, and it has always been the custom where school sections have been allotted to give to the State in lieu of such sections other sections, not exceeding two in any township.

Mr. Finley. Is it true that some of these lands have been allotted to the Indians?

Mr. Burke of South Dakota. It is true that a portion of the lands have been allotted to the Indians.

Mr. Finley. Does the gentleman think theGovernment should be called upon to pay to the State of South Dakota for lands allotted to the Indians? Doesn't the land belong to the Indians? I ask the gentleman if that practice has been the usual one?

Mr. Burke of South Dakota. We have heretofore appropriated to pay for sections 16 and 36 in every township, or where they had been taken to pay for a section in lieu thereof.

Mr. Finley. Has that been the rule where lands are allotted to Indians?

Mr. Burke of South Dakota. Yes; that has been the rule and was the rule in the former Rosebud bill which passed the Fifty-eighth Congress, and is exactly in line with this provision, and the price is the same. 41 Cong. Rec. 3104 (1907).

Although Congressman Burke could have explained the necessity for the inclusion of such a provision more succinctly as he had in other instances, an examination of the House and Senate reports reveals why such a detailed statement in this instance would have been superfluous. One entire page of each of these reports is devoted to this very question:

> Section 6 of the bill reserves sections 16 and 36 in each township for the use of the common schools, and grants the same to the State of South Dakota, and section 7 makes an appropriation to pay for the same at $2.50 per acre. This is following the *precedents* which have heretofore been established in the *opening* of other reservations in South Dakota, and is based upon section 10 of the act of Congress admitting South Dakota into the Union, approved February 22, 1889. Said section is as follows:
>
> SECTION 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any part thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants nor indemnity provisions of this act, nor shall any lands

> embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act *until the reservation shall have been extinguished and such lands restored to and become a part of the public domain*
>
> The following are the *precedents*:
> By section 30 of the act opening and dividing the *Great Sioux Reservation*, sections 16 and 36 were granted to the State, and an appropriation of $1.25 per acre was made to pay for same. Act approved March 2, 1889. (25 Stat. L. 898.)
>
> By section 30, act approved March 3, 1891, opening the Sisseton and Wahpeton Reservation, the school sections were ceded to the State and an appropriation made, and the same were paid for at $2.50 per acre. (26 Stat. L. 1039.)
>
> By act of August 15, 1894, opening the Yankton Reservation, the school sections were ceded to the State and paid for at $3.75 per acre. (28 Stat. L. 313.)
>
> Act providing for sale of Rosebud Reservation, in Gregory County, school sections were ceded and paid for at $2.50 per acre, and act authorizing sale of a portion of the Lower Brule Reservation, first session of the (Fifty-ninth) Congress, school sections were ceded to the State and paid for at $1.25 per acre. H.R. Rep. No. 7613, 59th Cong., 2d Sess. 3-4 (1907); S.Rep., No. 6838, 59th Cong., 2d Sess. 3 (1907) (emphasis added).

Whether one prefers the "opening" of the 1889 Reservation or the "sale" and "cede" of the 1904 Gregory County Act or whatever, the 1907 Act *was intended by Congress* to extinguish that portion of the Rosebud Reservation lying in Tripp County and restore it to the public domain in the same manner. It is with this in mind, as well as Commissioner Leupp's statement that appellee now turn back to a comment made by Congressman Burke on the floor of the House.

3. The Congressional Record. Certain statements appear throughout the Rosebud documents that the counties submit are susceptible of only one interpretation when viewed in their proper historical perspective and in light of the information stated in the other contemporary documents dealing with that reservation. Congressman Burke made just such a statement on the floor of the House on February 16, 1907:

> The Indians, as I have stated before, have agreed to the disposition of it under the terms of the bill. *They will have left, after this land is disposed of, a reservation that is substantially 50 miles square, and there are only 5,000 Indians.* 41 Cong. Rec. 3104 (1907) (emphasis added).

This statement is the perfect example of how the serial effect of the Rosebud homestead acts can be viewed both retrospectively and prospectively. Retrospectively, Gregory County was no longer a part of the reservation. Prospectively, Tripp County would soon be similarly located.

This quotation was presented by appellee to the court below in its brief at 27 and this is precisely the same manner in which the court below viewed the statement:

It can been seen, upon examining a map, that the quotation '50 miles square' referred to in the quote relates approximately to the size of the reservation minus Gregory, Tripp and Lyman Counties. Mellette and Todd County make up a generally square area, roughly 50 miles on a side. Again, one can see thecontinuous policy with relation to theRosebud Indian Reservation and opening the reservation, diminishing the reservation, and extinguishing the reservation nature of the lands concerned. A.A. I at 54.

Here is a sponsor of the 1907 Act, one, as stated in appellant's brief " 'that we look to when the meaning of the statute's words is in doubt.' " referring the whole House to a "reservation substantially 50 miles square," blatantly in opposition to appellant's whole theory in this case, cited and heavily relied upon by the court below, –and what is appellant's response? Again, appellant has failed to address any portion of its brief, either in the court below or in this Court, to this unequivocal and probative evidence of congressional intent.

Instead, it devotes another two pages of its brief to attacking yet another portion of the opinion of the court below:

The district court misconstrued the allotment . . .

> In the third place, in drawing its parallel with *Mattz*, the district court incorrectly read the allotment language of the Rosebud 1907 Act . . .*the district court incorrectly read the allotment language of Section 2 of the 1907 Act* . . . B.A. at 23, 25. (emphasis as in original).

which concludes with "Had Congress intended to dissolve the reservation status of the Tripp county portion of the reservation, it hardly would have provided for 160 acre allotments anywhere on the reservation, including Tripp County." B.A. at 27. The actual provision to which appellant refers is Section 2 of the 1907 Act:

> . . .Provided, that prior to said proclamation, the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotments and to receive in lieu thereof an allotment anywhere within said reservation. . . . Act of March 12, 1907, Sec. 2, 34 Stat. 1230.

Evidently appellant has prefered to set forth in its brief what it views as a more favorable paraphrased version, rather than the section of the act itself. B.A. at 26. In any event, this section does not support the position of the appellant in any way. The reason for the somewhat awkward reading of the provision as compared to the explicit language of the 1910 Act, is because of a special set of circumstances which then existed on the Rosebud Reservation. As the Commissioner of Indian Affairs explained to Inspector McLaughlin in his instructions:

> The Office is in receipt of a communication of November 22, from Hon. Charles H.

> Burke, wherein he says that he recently visited the Rosebud Reservation for the purpose of gaining information with a view to preparing a bill for the sale of that part of the reservation located in Tripp County; that he found that a large number of Indians had taken allotments in the western and southwestern parts of the reserve, and on lands which are now, and always will be,worthless, being nothing but sand hills; that the Indians who have allotments in the reservation elsewhere than in Tripp County should be permitted, in the discretion of the Secretary of the Interior, to relinquish them and to take allotments in lieu thereof in some other part of the reservation, including Tripp County; A.A. III, doc. 18 at 4.

In the first instance, of course, Tripp County was a part of the reservation –at the time of the instructions– at the time the bill was written –at the time the reports were made –and for purposes of allotment it would continue to be a part of thereservation until the act was passed and the lands opened to settlement.

Secondly, Gregory County, the eastern part of the original reservation was not within, directly or indirectly, the purview of this section which was designed to alleviate a condition in the *western* and southwestern parts of the reserve. The provision would, in addition, as the court below stated, still allow the Indians in the portion soon to be opened, to relinquish and remove to the diminished portion of the reservation –if they wanted to so remove.

Finally, but for the special conditions the very section which appellant thought in some way supported its argument, could very well have contained the same terminology of the 1910 Act –a terminology that definitely does not support its position. Therefore, in light of the reasons for the special wording of this 1907 section, and the context within which the court below was comparing it and a similar section of the 1910 Act to a portion of the *Mattz* opinion, the court below did not misconstrue this or any other section of the 1907 Act and its construction is *not* "in direct conflict with the plain language of the 1907 Act and the committee reports," as appellant has ascerted. B.A. at 26. Its opinion that:

> The allotment sections, the school land provisions, the many negotiations conducted by Inspector McLaughlin, the congressional reports and debates, and the subsequent congressional enactments for each act lead this Court to believe and be of the opinion that the surrounding legislative history and the circumstances *clearly* indicate a congressional intent to separate each of the counties concerned, to return those counties to the public domain, and to extinguish the reservation or 'Indian land' nature of those counties thereafter. . .A.A.I at 74-75 (emphasis as in original).

is as well founded and sound today as it was when it was written.

III. THE DOCUMENTS AND STATUTES CONCERNED WITH TRIPP COUNTY AFTER THE PASSAGE OF THE 1907 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED AGAIN

1. 37 L.D. 124 (1909):

OPENING OF ROSEBUD INDIAN LANDS IN SOUTH DAKOTA (TRIPP COUNTY).

Regulations

Department of the Interior
Washington, D. C., Aug. 25, 1908.

The Commissioner of the General Land Office.

Sir: Pursuant to the proclamation of the President issued August 24, 1908, for the opening to settlement, occupation and entry of certain lands *formerly* within the Rosebud Indian Reservation in the State of South Dakota, under the act of Congress approved March 2, 1907 (34 Stat., 1230). . . .

Very respectfully,

Jesse E. Wilson,
Acting Secretary
(emphasis added)

2. EIGHTH ANNUAL REVIEW OF THE PROGRESS OF SOUTH DAKOTA FOR 1908. V. STATE DEPT. of HISTORY, SOUTH DAKOTA HISTORICAL COLLECTIONS 45 (1910):

Perhaps the most noteworthy event ofthe year 1908 in South Dakota has been the opening to settlement of the unallotted lands in *Tripp County, formerly a portion of the Rosebud Indian Reservation.* Pursuant to an act of Congress providing for the opening of these lands, the President in September issued his proclamation, directing that from October 7 to October 17 parties desiring to locate homesteads upon the Tripp County lands be permitted to register for the chance of drawing a homestead at Dallas, Bonesteel, Chamberlain or Presho, and during the period designated 114, 769 registrations were made, though there were but about four thousand homesteads available. The registrations exceeded the former rush to Gregory county lands in 1904 by more than eight thousand. . . (emphasis added).

3. Report to the Commissioner of Indian Affairs, Annual Report of theRosebud Agency, C.L. Ellis, Agent, 21-27 (1909):

. . .The Rosebud agency is located on the southern boundary of South Dakota.

Originally the reservation extended to the Missouri river onthe east, a distance of 150 miles east and west, and 50 miles north and south, and contained about three and one-quarter million acres of land. By the act of April 23, 1904, that part now known as Gregory County, on the eastern end of the reservation, was ceded and the surplus or unallotted lands made availagle for homesteads. Under the act of March 2, 1907 (Public No. 195), a tract about 33 miles east and west and 50 miles north and *east of the present diminished* reservation was opened to settlement. . . .

What is now known as the *diminished* reservation is a tract about 50 miles square embracing the western part of the original reservation. . . .

If the whole of the *diminished* reservation was attached to Tripp County for judicial purposes it would be much more convenient and expeditious. . . .

The diminished reservation, containing about 2500 square miles, is wholly a cattle range at present. . . .

The burning of the grass on a great part of Tripp County early last winter found many of the cattlemen's stock to seek grass on the *diminished* reserve. . . .

In order to keep the cattle of the *diminished* reservation from becoming reinfected by mingling with outside stock I have asked authority for material and labor to complete the south fence line, and to construct a fence along the Tripp County line to the 10th Parallel. Many thousands of posts and much labor have been expended inrepairing the fences on the other *three* sides of the reservation this season and they are now in good condition.

All the other day schools are located in the *diminished* reservation. . . .

Many new towns have sprung up near the reservation boarders and in Tripp County. . . .

C.L. Ellis
Special Indian Agent
in charge
(emphasis added).

4. Report of the Commissioner of Indian Affairs, 42 (1909):

Rosebud, S. Dak.—This reservation has been *diminished* very rapidly within the last few years by various acts of Congress. . . .

Respectfully,
Robert G. Valentine
(emphasis added).

See Appendix at 83, 84, 85, 86.

1910 ACT [14]

The 1910 materials are the most valuable documents for presenting what appellee would prefer to term, a proper historical perspective of the Rosebud legislation. Not only is the retrospective-prospective aspect discussed in the 1907 section more pronounced because of the

14. Act of May 30, 1910, 36 Stat. 448—All of Mellette County.

passage of time, but also herein lies the first history of the Rosebud legislation related by those members of Congress primarily responsible for the three acts.

Again, the format for presenting the 1910 materials will consist of the same three interrelated subheadings used in the discussion of the 1904 and 1907 acts.

I. THERE IS STILL NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE TRUSTEE–HOMESTEAD AMENDMENT WAS INTENDED TO AFFECT THE DIMINUTION WHICH YOUR APPELLEE HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP–SUM CESSION AGREEMENT

In light of the fact that the documents in this section set forth the entire history of the Rosebud legislation, one would expect that the elusive concept upon which appellant has premised its argument would at least be mentioned somewhere in these 300 odd pages–but it is not. Indeed, appellee has been unable to locate and appellant has not cited even one paragraph stating this concept in any of theRosebud douments concerned with the three acts.

II. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE 1910 ACT WAS INTENDED TO EFFECT A SIMILAR DIMINUTION TO THAT WHICH YOUR APPELLANT HAS ESTABLISHED WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP–SUM CESSION AGREEMENT AND WHICH DID FOLLOW THE 1904 and 1907 ACTS

A. CONTINUITY

To a large extent, the continuity that has manifested itself throughout the history of the Rosebud legislation is still apparent in the documents surrounding the 1910 opening.

Some of the men concerned with the earlier Rosebud legislation were no longer in Washington, but the two most influential still remained: Senator Gamble and Congressman Burke. Inspector McLaughlin, although now presenting the proposals only to procure the Indians' views and not to obtain a signed agreement, was still negotiating with the Rosebud Indians in formal council at the Rosebud Agency.

The most striking evidence of continuity of policy can be gleaned from the remarks of various individuals and documents concerned with what then constituted *the* reservation. In the

1907 subsection on continuity appellee stressed that Gregory County was simply no longer considered a part of the reservation and Tripp County would soon be similarly located. The 1910 materials support this conclusion without exception.

1. The Eastern and Northern Part. In 1901, the Indians and Inspector McLaughlin referred to Gregory County as *the* "eastern part" of the reservation. In 1906 *the* "eastern part" of the reservation was Tripp County. Now, in 1909-1910, the Indians and Inspector McLaughlin continually refer to certain townships located immediately *west* of Tripp County as *the* "eastern part of our reservation." C.T. at 6 (1909). In this connection, they are joined by none other than the Secretary of the Interior, James Rudolph Garfield, who refers to this same strip of land as not only being *east* but also in the *diminished* reservation – i.e. "on the *east* of the present *diminished* reservation." S. Rep. No. 887, 60 Cong., 2d Sess. 3 (1909) (emphasis added). (The cited source contains a letter from James Garfield, Secretary of the Interior to Robert J. Gamble, January 26, 1909.)

Corresponding to this "eastern" concept are the other references to the area to be opened by the 1910 Act as constituting the entire "northern part" or the "north part of our reservation." C.T. at 8,20 (1909). Almost without exception, appellant has not even attempted to explain away or circumvent the implications of this or similar congressional material contained in the House and Senate documents discussed immediately below.

2. The Senate and House Documents. This same concept of precisely what the boundaries of the Rosebud Reservation encompassed was also present in Congress. In 1909 the Senate Report on the pending legislation stated that: "The present area of the Rosebud Indian Reservation aggregates 1,800,000 acres." S. Rep. No. 887, 60th Cong., 2d Sess. 1 (1909). Later, on the floor on the Senate, Senator Gamble remarked that "the Rosebud Indians have a reservation of nearly 2,000,000 acres." 43 Cong. Rec. 1679 (1909). The Senate Report of the 1910 bill reiterated that: "the present area of the Rosebud Indian Reservation aggregated about 1,800,000 acres." (S. Rep. No. 68, 61st Cong., 2d Sess. 2 [1910]), and the House report stated the same thing in more definite terms.

The appellee would submit that to have a reservation with a present *area* of approximately 1,800,000 acres, to refer to land west of Tripp County as the east part of the reservation and Mellette County as the north part of that reservation, is to have a reservation in Congressman Burke's words "that is substantially 50 miles square" and whose boundaries could not possibly encompass either Tripp or Gregory County. Only with this concept in mind, can one grasp the full import of the Secretary of the Interior's statement that "the Rosebud Reservation has been reduced

very rapidly during the last few years." Letter to Robert J. Gamble, *supra*.

Although primarily cited for the proposition that Mellette County was soon to be similarly located, some of the material in the next subsection should also be analyzed in retrospect as well as for the general evidence of continuity appearing therein.

B. A DIMINISHED RESERVATION

Three specific areas can be cited for the proposition that the 1910 Act was to further diminish the Rosebud Indian Reservation in precisely the same manner as the 1904 and 1907 Acts: (1) The Anticipatory Statements, (2) Specific References to what was to be the Diminished Reservation, (3) Provisions of the 1910 Act. This is the material to which the court below attributed "the clearest indication yet of the congressional intent to diminish the Rosebud Reservation" and from which it was able to state that there was

> no doubt in this Court's mind, after having reviewed the contemporary documents from the passage of the 1910 Act, and the congressional history thereof, that the Congress of the United States had the intention of diminishing the Rosebud Reservation. . . A.A.I at 73.

In the court below and again in this Court, appellant has failed to even discuss, much less circumvent, the bulk of this material anywhere within the over 100 pages of briefs submitted to date. Certainly the problem could not have been an unawareness of its existence, for all of this material was set forth in quotations inthe brief of appellee below,and your appellee is not aware of any inaccuracies with respect to substance or citations.

1. Anticipatory Statements. Appellee includes herein references such as:

> The *present* area of the Rosebud Indian Reservation aggregates 1,800,000 acres. The lands proposed to be opened to settlement under the provision of this bill embrace an area of about 900,000 acres. . . The reservation is *yet* large. . . S. Rep. No. 887, 60th Cong. 2d Sess. 1,2 (1909) (emphasis added).

> The *present* area of theRosebud Indian Reservation aggregates about 1,800,000 acres. The lands proposed to be opened to settlement under the provisions of this bill embrace an area of 830,000 acres. . The reservation is *yet* large. . . . S. Rep. No. 68, 61st Con,t., 2d Sess. 2 (1910) (emphasis added).

> The area comprised in thepresent bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. There *will still be left* a reservation containing about 1,000,000 acres. . . H.R. Rep. No. 429, 61st Cong., 2d Sess. 2 (1910) (emphasis added).

> Mr. Gamble. . . .The Rosebud Indians *have* a reservation of nearly 2,000,000 acres. A bill has been introduced and favoraly reported by the Interior Department, and a unanimous report made from the Committee on Indian Affairs, under which it is *proposed* . to open about *one-half* of the reservation to settlement. . . .43 Cong. Rec. 1679 (1909) (emphasis added).

> No U.S. Indian Inspector nor any other person or persons as yet has been authorized to explain this bill to us; therefore we would like to see someone that can give us at least a word security regarding the opening of any lands upon what *now* constitutes our reservation. Petition by Indians or the Rosebud Reservation (signed by Todd Smith and Reuben Quick Bear) to Hon. Wm. H. Taft, President of the United States, February 25, 1910 (emphasis added).

Such statements "anticipate" a *diminution* of the reservation of the type referred to specifically in the next subsection.

2. Specific References to what was to be the Diminished Reservation. By letter of April 29, 1909, Inspector McLaughlin reported to the Commissioner of Indian Affairs that the Indians expressed "their concurrence in the opening of the northern strip, provided the two tiers of townships in the eastern part of Meyer County remain a part of the *diminished reservation* " Letter from Inspector James McLaughlin to the Secretary of the Interior, at 3, April 29, 1909 (emphasis added). He also told the Indians specifically that "The opening of that part of your reservation will not only increase the value of the lands in that tract, but will also add a great deal to the value of the lands in your *diminished* reservation." C.T. at 14 (1909)(emphasis added). Other references of this nature include, but are not limited to, the following:

> I do not believe,therefore, that the strip of land on the *east* of the *present diminished reservation* should be opened yet. S. Rep. No. 887, 60th Cong., 2d Sess. 3 (1909). The cited source contains a letter from James Garfield, Secretary of the Interior to Robert J. Gamble, January 26, 1909 (emphasis added).

> It also provides that the Secretary of the Interior in his discretion, may permit Indians who have an allotment *within the area proposed to be opened to relinquish such allotments and to receive in lieu thereof allotments anywhere within the reservation proposed to be diminished* S. Rep. No. 68, 61st Cong., 2d Sess. 3 (1910) (emphasis added).

> It also provides that the Secretary of the Interior, in his discretion, may permit Indians who have allotments within the area proposed to be opened to relinquish such allotments and to receive in lieu thereof allotments anywhere *within the reservation proposed to be diminished* S. Rep. No. 68, 61st Cong., 2nd Sess. 3 (1910) (emphasis added).

> The bill is carefully safeguarded and provides that Indians who have taken allotments in the area proposed to be disposed of may relinquish such allotments and be reallotted within the *diminished reservation*, if they so elect. . . .

> The area comprised in the present bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. *There will still be left a reservation containing about 1,000,000 acres and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette county is disposed of.* H.R. Rep. No. 332, 61 Cong., 2nd Sess. 2 (1910); H.R. Rep. No. 429, 61st Cong., 2nd Sess. 2 (1910) (emphasis added).

If there was no occasion for continuing a reservation larger than it would be when Mellette County was disposed of and the reservation was therefore to be diminished, one would expect the 1910 Act itself to contain not only provisions consistent with this objective but also provisions inconsistent with the continued existence of that part of the reservation affected by the 1910 Act – and indeed it does.

3. Provisions of the 1910 Act. Although the entire text of the 1910 Act is consistent with the concept of a diminished reservation, the counties will only discuss certain parts of sections 1, 2 and 8 at this point.

(a) Section 8: School Lands. The history of this provision and the necessity for its inclusion in the 1901 agreement, the 1904 Act, and the 1907 Act has already been set forth in detail at 5, 29-34, 51-55, *supra*. Therefore, it is necessary only to state that the same reason, namely the extinguished reservation and public domain section of the enabling act which would be made operative by the 1910 Act diminishing the reservation, was given for its incorporation into the 1910 Act:

> Sections 16 and 36 of the lands in each townships are not to be disposed of, but are reserved for the use of the common schools of the State, and these lands are to be paid for by the Government *in conformity with the provisions of the act admitting the State of South Dakota into the Union.* S. Rep. No. 887, 60th Cong., 2d Sess. 2 (1909) (emphasis added).

> Sections 16 and 36 of thelands in each township are not to be disposed of, but are reserved for the use of the common schools of the State, and these lands are to be paid for by the Government *in conformity with the provisions of the act admitting the State of South Dakota into the Union.* S. Rep. No. 68, 61st Cong., 2d Sess. 3 (1910) (emphasis added).

> There is also a provision reserving sections 16 and 36 of the lands in each township for the use of the common schools of the State of South Dakota, to be paid for by the Government at $2.50 per acre. The granting of these lands to theState is *in accordance with the provisions of the enabling act admitting South Dakota into the Union.* H.R. Rep. No. 332, 61st Cong., 2nd Sess. 2 (1910); H.R. Rep. No. 429, 61st Cong., 2nd Sess. 2 (1910) (emphasis added).

> Mr. Gamble. . . .The Government agreed to reserve these lands and pay for them, not

> only by law, but *under the enabling act* admitting the State of South Dakota to the Federal Union. . . .
> Mr. Crawford. . . .Sections 16 and 36, to which the Senator refers, are held from the settler, and are given to the State to keep good the pledge made to the State by the Government *under the enabling act* when the State was admitted into the Union . .. .Mr. President, with reference to sections 16 and 36, they or their equivalent belong to South Dakota, because theGovernment of the United States granted section 16 and 36 to the State *in the enabling act* under which the State was admitted into the Union, as it has granted to states *over and over again millions of acres of public domain* for the establishment and maintenance of common schools. 45 Cong. Rec. 1068, 1071 (1910) (emphasis added).

(b) Section 1: Indian Agency, School, and Other Lands. As for the land reserved as long as "agency, school, or religious institutions are maintained thereon for the benefit of said Indians" (Act, *supra*, Sec. 1) to which appellant alludes, appellee can find nothing therein which is inconsistent with its position. After all, Congress was aware of the Indian population that was allotted within the "tract to be ceded" and certainly did not expect *all* of these individuals to "relinquish the same and select allotments in lieu thereof on the diminished reservation." Act, *supra*, Sec. 1. For Congress to provide for these Indians in this manner is not inconsistent with the fact that the area to be opened would no longer be a reservation. As the court below stated,

> Congress knew that various members of the Rosebud Sioux Tribe had taken allotments in the lands soon to be ceded, and these provisions attempted to continue to provide for those people in that area, although the land would no longer be considered as reservation. A.A.I at 69-70.

Appellant's assertion that "terminating the reservation status and setting land aside for future use for agencies to serve the Indians, for Indian school and for missions, all for the benefit of the resident Indians, cannot be reconciled with termination of reservation status." is not in accordance with the bulk of the contemporary documents of the period. B.A. at 21.

(c) Section 4: Timber Lands. At twenty-two of appellant's brief the following question appears:

> If, as held below, that portion of the reservation were being wiped out and Indian title extinguished, why reserve timber lands to the Tribe? Why leave the Tribe with vested interests? The opinion below was silent of the point. B.A. at 22.

A similar inquiry was also raised by appellant below and evidently the court below was satisfied with the answer that was submitted. Namely that the Congressional Record also supplied an answer to appellant's inquiry as to the reservation of timber lands toward the use of the Rosebud Indians:

> Mr. STAFFORD. Will the gentleman explain why he recommends an exception in

appraisement of mineral and timber lands?
Mr. BURKE of South Dakota. Because they are not to be disposed of. We are reserving them. Consequently we provide that they shall not be appraised. . . .
Mr. MONDELL. What is the gentleman's purpose in not disposing of the timber lands?
Mr. BURKE of South Dakota. We are providing in this bill and in the other bill that is exactly in the same form for reserving the timber land for the use of the Indians as a forest. *As a matterof fact, on this particular reservation there is not a single stick of timber, but the department seems to think the timber ought to be conserved*, and so we put this language in thebill.
Mr. MONDELL. You are conserving some timber that does not exist.
Mr. BURKE of South Dakota. So far as this reservation is concerned that is true, but we are establishing a precedent that might be good to follow in other reservations where there may be timber. . . .
Mr. BURKE of South Dakota. There is, as a matter of fact, no timber land in this reservation. We doubt if there will be found any lands that will be regarded as timber lands. But is was put in as a mere matter of precaution. 45 Cong. Rec. 5471, 5472 (1910) (emphasis added).

Even if the presence of this provision was other than merely precautionary, appellee would still be unable to discern any purpose other than one consistent with the acknowledgment by Congress of the continued presence of some members of the Rosebud Sioux Tribe in the area to be opened. In this light, the inclusion in the 1910 Act of some provisions for their benefit would seem to be entirely reasonable and not in any way inconsistent with the concept of a diminished reservation.

d. Intoxication Provision: At the conlusion of the section of appellant's brief on the intoxicant provision, appellant asserts that "Section 10 should have led the court below to the opposite conclusion." B.A. at 33. Yet nothing stated therein supports that assertion. The court below addressed a portion of its opinion in response to a specific question raised in the brief of appellant below: "And why did Congress specifically prohibit the introduction of intoxicants into Mellette County for twenty-five years just as if that county were Indian Country if it were not a part of the reservation?" (B.P. at 49) or as paraphrased in the text of the opinion: "The plaintiff would attach to this provision the Congressional intent to continue the lands in Mellette County as Indian lands." A.A.I at 67. In responding, the court below was impressed with the limited duration of the protection and concluded, correctly, that "Evidently Congress felt that is must provide a special section to prohibit such intoxicants for a period of time to protect the Indians who still had allotted lands in that area." A.A.I at 67.

This position was soundly supported by remarks in the debate on the provision wherein the court also found enlightening certain remarks in the Congressional Record stating that: "there is no longer a reservation when the lands are sold." 45 Cong. Rec. 5462, 5464.

The origin of the provision in the Mellette County Act can be traced to the Secretary of the Interior, R.A. Ballinger, who recommended that intoxicant provision in light of the then recent United States Supreme Court Case of *United States v. Dick*, 208 U.S. 340 (1908), which held prohibitions of this nature to be constitutional even though the land was to be ceded and restored the public domain. Specifically, Mr. Ballinger stated.

> The Supreme Court of the United States in Dick v. United States (208 U.S., 340), sustained a provision prohibiting the introduction of intoxicating liquors upon lands ceded by Indians for a period of twenty five years, but emphasized strongly the fact that the provision was for a limited period reasonable in duration. The Department doubts very much the advisability of attempting to impose upon ceded lands a perpetual prohibition against the sale of intoxicants, and also doubts the advisability of prescribing punishment for the sale of liquors in violation of the law. . . .Letter from R.A. Ballinger, Secretary of the Interior to Charles H. Burke, January 13, 1910.

Certainly this explanation should *not* have "led the court below to an opposite conclusion." B.A. at 33. Similarly, the citation of *Cohen*, by the court below which stated that "the purpose of this measure was to prevent sale of liquor on the boundaries of the land retained by the Indians [i.e., the diminished reservation]" was chastised by the appellant has having "no rational basis." B.A. at 32 (21). Unfortunately for appellant, the very same United States Supreme Court decision cited by Secretary Ballinger as the reason for the inclusion of the provision in the 1910 Act was also cited by Felix Cohen as an example of one of the "extensions upheld" by the United States Supreme Court in a footnote to the very same paragraph cited by the court below. *Cohen* p. 353 footnote 26.

Also, appellant's paraphrasing of what the court below "erroneously assumed" or failed to correctly assume (B.A. at 32) would seem to your appellee to somewhat distort what was actually presented in the opinion of the court below. For example, the court below did not use the term "buffer area" in its entire opinion.

(e) Section 1: "On the Diminished Reservation."

In the court below, appellant devoted six full pages of its brief to an attempt to convince that court to either totally disregard, attribute a different meaning to, or subject the following phrase to some ambiguity rule.

> **Provided, That any Indians to whom allotments have been made on the tract to be *ceded* may, in case the elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the *diminished reservations*. . . .Act, *supra* (emphasis added).**

In this Court, appellant, while only devoting three pages of its brief to similar events goes one step further and actually asserts that "What the district court conceived to be evidence of an intent to dissolve the reservation status." B.A. at 29(emphasis added). This statement is as untenable as the assertion made in the court below that:

> *The Mellette County Act contains a phrase which renders Congress' intent regarding the future status of that portion of the Rosebud Reservation uncertain and therefore subject to the rule that doubtful expressions be resolved in favor of the Indians in statutes passed resolved in favor of the Indians in statutes passed for their benefit.* B.P. at 45 (emphasis as in original).

and the "to remain reservation Indians and receive the benefits of Government programs" argument which has already been discussed and disposed of at 16, 17, *supra*. . . irrespective of whether or not this would involve "so insensitive a result." B.A. at 28.

The remainder of appellant's alternative arguments will not withstand analysis either. For example, the statements in the *Mattz* opinion referring to the "was" in the Klamath River Reservation were intrinsically limited to the peculiar fact situation presented therein (the fact the reservation was considered to have been abandoned prior to the 1891 executive order) and as such are of no assistance whatsoever to appellant's "shorthand term of identification" argument. B.A. at 29.

Finally appellant urges that the "word 'diminished', as used in the 1910 Act must be delegated its place in the total context" and then sets forth a quotation from *Condon*. B.A. at 28. Earlier in its brief appellant had urged: "The reservation status of the Rosebud Reservation turns on the meaning and effect of those three statutes. But that meaning in effect takes life only in the *context of the history of the reservation.*" B.A. at 2 (emphasis added). The appellee would submit that in this instance, *this* remains a more appropriate place from which to ascertain the proper context and meaning of the word "diminished", indeed of the entire phrase in which it is contained. As far as the significance which appellant has anticipated appelleewould attach to this phrase, it has simply miscalculated. In the first place, appellee would never advocate that an issue of congressional intent be disposed of by either a "casual reading" of an act or the presence of an "isolated word." B.P. at 46. The whole of this brief has been constructed around the concept that if the acts are construed in their proper historical perspective and in light of all the probative evidence of congressional intent that is available a picture of a reservation diminished by a *series* of acts unfolds. After all, in appellant's words, "This action seeks declaratory judgment as to the *effect* of these acts, 1904, 1907, 1910, on the size of thereservation. In truth the action asks the court to define for the parties the present boundaries of the Rosebud Indian Reservation." A.P. at ix (emphasis added). Of course,

appellee deems significant the fact that the 1910 Act, on its face and in plain language referred to the tract as being "ceded" and the reservation as being "diminished." But it is when this phrase is viewed in conjunction with the other material, such as Congressman Burke's statement of April 27, 1910:

> Mr. BURKE of South Dakota. . . .I might say, Mr. Speaker, that there are two propositions to be considered in disposing of the unallotted and unused lands on Indian Reservations. One is, at the earliest possible date, to get among the Indians the white men, andhave those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms, and *I believe that the placing through what were heretofore reservations* actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to these allotments which at present are of very little value. . . .45 Cong. Rec. 5457 (1910) (emphasis added).

and House Reports No. 332, 429.

> The area comprised in the present bill is about 800,000 acres and the proceeds from the sale therof, under the terms of the bill, will probably amount to $3,000,000. *There will still be left a reservation containing about 1,000,000 acres, and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of* . . . . . H.R. Rep. No. 332, 61st Cong., 2nd Sess. 2 (1910); H.R. Rep No. 429, 61st Cong., 2nd Sess. 2 (1910) (emphasis added).

that the "effect of the acts" on the Rosebud Reservation can best be realized. And this was the manner in which the court below treated the question presented:

> It is this Court's opinion after having examined all the contemporary legislative materials, various government reports and discussions that the whole context of the acts from 1904 through 1910 had but one purpose in mind. It is clear that the purpose of those acts was to open those reservations to non-Indian settlers and to civilize those areas in what the Congressman obviously regarded as an uncivilized portion of the United States. As each successive act was proposed in Congress various reports referred to a continuing diminished size of the Rosebud Reservation. Originally the reservation was said to comprise 3,000,000 acres and later 1,800,000 acres and to finally compromise the reservation roughly to the size of 1,000,000 acres. A.A.I at 74.

There are no less than forty separate and unequivocal references in the Rosebud documents attributing a similar meaning to diminished that can only be equated with reduction of the boundaries of the Rosebud Reservation, some of which have been set forth *supra*, and some of which remain to be discussed.

(f) Todd County.

> No legislation has been enacted providing for the opening of Meyers [Todd] County, South Dakota, and until provision has been made for such opening that county will

remain a part of the Rosebud Reservation. Letter of March 24, 1909, from Acting Commissioner of Indian Affairs to W.W. Rankin. Archives 16937-09, Rosebud 308.1.

The position of appellee has been throughout this entire brief that Congress intended that each county affected by each act would be necessarily removed from the Rosebud Reservation. In other words, only after provision had been made for each opening was the county thereby removed. In 1909, *referring specifically to the Rosebud Reservation*, the Acting Commissioner of Indian Affairs succinctly paraphrased your appellee's position: "No legislation has been enacted providing for the opening of Meyers [Todd] County, South Dakota, and until provision has been made for such opening that county will remain a part of the Rosebud Reservation." Letter, *supra*.

The legislation referred to by the Acting Commissioner *was* introduced a short time later and as a postscript to the detailed discussion of the legislative history of the three acts presented heretofore, appellee would urge this Court to consider the following documents and their bearing upon the opinion of the court below in the arguments presented in this brief.

On page 48 of appellant's brief there appears a summary reference to a 1911 bill providing for the opening of Todd County, similar in all respects to the bills that were enacted to dispose of the surplus land of the Rosebud Reservation. At the conclusion of this discussion, appellant states "On the theory of the court below, if the 1911 bill had become law, *there would be no Rosebud Indian reservation.*" B.A. at 49 (emphasis added). This is precisely the substance of what the Acting Commissioner referred to above and this is precisely the interpretation given the proposed legislation by Inspector McLaughlin, Senator Gamble, the Commissioner of Indian Affairs, the Acting Commissioner of Indian Affairs, and the Secretary of the Interior.

In May of 1911 Senator Gamble introduced a bill for the sale and disposition of the surplus lands of Todd County and requested the Secretary of the Interior to submit a report on the merits of the proposed legislation. In his letter to the Secretary, Senator Gamble stated:

> . . . .The area proposed to be opened compromises *all the remaining lands within the Rosebud Reservation*. Conditions are such on this reservation I believe it would be greatly to the advantage of the Indians should the lands be open to settlement. Railway extensions are in prospect in this part of the state. The opening of the lands would encourage and I believe make certain such extension. . . .The development of this part of the state has been greatly retarded in consequence so much of the lands being held *within* Indian reservations, and I regard it a matter of the utmost importance to the development and growth of the state that the lands be thrown open to settlement at the earliest practicable date consistent with the best interest of the Indians. I know of no substantial reasons why such conditions do not now exist. Letter from Senator Gamble to the Secretary of the Interior, April 12, 1911.

The Secretary, by letter of May 19, 1911, declined to do so, until Inspector McLaughlin could ascertain the wishes of the Indians.

On May 22, 1911, Inspector McLaughlin was instructed to proceed and complete his report by next December prior to the convening of Congress. As usual, the secretary noted that "Detailed instructions appear unnecessary in view of your several similar assignments in the past." A.A.III. doc. 36.

On November 1st Inspector McLaughlin convened the council at the Rosebud Agency. The members of the Rosebud Sioux Tribe were unanimously opposed to the proposition:

> RUBIN QUICK BEAR: . . .Everytime you come here we give you the land. . .Now we have a small reservation and we don't want to sell or dispose of it in any form.
> TODD SMITH: Whatever I say here about the proposition is all right and Senator Gamble will know it. Tell him that he wants to buy Todd County but Todd (Smith) won't sell it.
> LEWIS BORDEAUX: . . . .Before when you came for land I was always glad to help you because you are a friend of mine. *We have given you three good counties of land. And this last county we have, there is very good little land left in it, but a large lot of sand hills.* Therefore we want to preserve this land for ourselves and we pray you for this. The people are still increasing and we want to save this land for them. *We have given you three counties.*
> CLARENCE WHITE THUNDER: . . .The next time the Great Father sends his message to Congress tell him not to mention Todd County. *We will hold on to Todd County for 50 years.* A.A. III. doc. 37 at 3,5,8,9,11. (emphasis added).

Inspector McLaughlin's response incorporates the essence of the holding of the court below and appellee's position before this court:

> INSPECTOR McLAUGHLIN: . . .I fully appreciate your feelings on this matter, knowing that *your reservation*, which *was a very large one a few years ago, is now reduced to the limits of Todd County*, and I can understand very well how you feel; that you are very desirous and anxious to retain this county intact. A.A.III doc. 37 at 14,15 (emphasis added).

In his report submitted on November 3, 1911 to the Secretary of the Interior, Inspector McLaughlin reiterated that:

> . . .The Indians appealed very feelingly for the retention of the remaining small acreage of their surplus land for allotment to children born to them, and it is believed that all of the agricultural lands of the *diminished* Rosebud reservation would thus be exhausted in the next two years.
> *The diminished reservation of the Rosebud Indians is now embraced in Todd County, South Dakota.* . . .161,920.10 acres of surplus and unallotted lands within the *diminished* Rosebud reservation, . . .In the past eight years the Rosebud Indians have

consented to *the opening of fully three-fourths of their original reservation*, that is Gregory County in 1904, Tripp County in 1909, and Mellette County, recently appraised and registered for, an open to entry April 1st next. With the *diminished reservationof the Rosebud Indians being now only about one fourth of its area eight years ago*, . . .The Pine Ridge Indians having at present three-fourths of their original reservation intact, while the Rosebud Indians, whose reservation adjoins the Pine Ridge Indian reservation on the east, have had *their reservation diminished in the past eight years to one-fourth of its original area*. . .they having so commendably consented to each of the three cessions of their reservation in the past eight years,. . . A.A. III doc. 38 at 2-3, 4-5 (emphasis added).

He concluded by saying that because of the opposition the opening should be deferred for a year or two but nevertheless noted that "certain erroneous wording in the Senate bill was superfluous" and should be deleted:

> . . .Furthermore, the provision in the first Section of said bill, lines 10 to 14, page 2, is superflous, which reads: 'That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof onthe diminished reservation.'
>
> The said Senate Bill provides for the opening of all the surplus lands of the Rosebud Reservation and should the bill become a law there would be no *diminished Rosebud reservation*. A.A.III, doc. 38 at 5,6 (emphasis as in *original*).

Evidently Senator Gamble had used the old Mellette County bill as a prototype for S. 100 and Inspector McLaughlin noted the error. In his report of April 30, 1910, the Assistant Secretary of the Interior concurred in McLaughlin's analysis, noting that "If the bill becomes a law, it will provide for opening all of thelands now constituting the diminished Rosebud Reservation, and *there will, therefore, remain no further diminished reservation*." A.A.III, doc. 39 at 4 (emphasis added).

In addition to the other reference in this report to Todd County as the "diminished reservation" (i.e., within the diminished reservation . . .within their diminished reservation. . .lands within the diminished Rosebud reservation. . . within the diminished reservation. . .) there appears another even more persuasive and unequivocal account of the openings:

> For the information of your committee, however, it may be pointed out that by successive openings within the past few years *this reservation has been successively reduced to less than one-fourth of its original area*. Gregory County was opened in 1904 under the provisions of the act of April 23, 1904, (33 Stat. L. 254), Tripp County, in 1908, under the act of March 2, 1907, (34 Stat. L. 1230); and Mellette County will be opened during the present year under the act of May 30, 1910 (36 Stat. L. 448), the President's proclamation therefor having been issued on June 29, 1911.
>
> It may be said that upward of 7,000 Indians within this reservation have previously been allotted approximately 1,679,000 acres of land, of which 636,300 acres fall *within Todd County – the diminished reservation*. A.A.III, doc. 39 at 4.

On January 23, 1913, Senator Gamble submitted S. Rep. 1166 containing the following remarks, again indicating that Todd County was *the* Rosebud Reservation:

> In the opinion of your committee the surplus and unallotted lands are unnecessary for the use of the Indians and the opening of *the* reservation will result in a large increase in the settlement and development of that part of the State and will, to a very large extent, enhance the value of the holdings of the Indians. Your committee regards it as of the highest importance, not only to the Indians themselves but to the people of the State and to the General Government, that all the surplus and unallotted lands should be open to settlement at the earliest practical date. A.A.III, doc. 39 at 2.

Then on February 27, after the superfluous language had been deleted as Inspector McLaughlin had suggested, the bill passed the Senate. 49 Cong. Rec. 4211 (1913).

Immediately thereafter, President Woodrow Wilson, the Commissioner of Indian Affairs, and the Secretary of the Interior were bombarded with petitions from members of the Rosebud Sioux Tribe requesting them to take action and prevent the legislation from passing the House. The petition of March 26, 1913, from the Rosebud Agency contains the following enlightening remarks:

> Hon. Commissioner of Indian Affairs
> Washington, D. C.
>
> Dear Sir: –We, the undersigned Indians of Todd County, S. D. respectfully protest against the proposed opening of this County to settlement. We protest against opening of *our last remaining portion of our once large Reservation* for the following reasons:
>
> 1. *We have already been deprived of the Counties of Gregory, Tripp and Mellette within the last few years*. . .
>
> 4. We think that the great body of Indians interested should be consulted with and their wishes ascertained in regard to *parting with our last remnant of a Reservation*.
>
> Petition to Commissioner of Indian Affairs,
> March 26, 1913, (emphasis added).

Another petition to the Commissioner of Indian Affairs on March 24 stated ". . .*We have already, since the treaty of 1889, contributed to the Government, to be opened to settlers, and sold, four tracts of land*. . ."Petition to the Commissioner of Indian Affairs, March 24, 1913 (emphasis added). The petition addressed to the Secretary of the Interior contained similar remarks ". . .The very best farming land that was in the Rosebud Reservation we gave up when the Counties of Tripp and Gregory were opened to settlement." Petition to the Sec. of the Interior, April 19, 1913 (emphasis added).

Soon thereafter, the Secretary of the Interior contacted Senator Gamble and stated in view of the

> fact that the Indians are decidedly opposed to *opening the diminished reservation* at this time and that there will be but little desirable land to place on the market, should the bill become a law, I have the honor to recommend that no further action be had on the bill at this session of Congress. Letter from the Secretary of the Interior to Senator Gamble.

In the same letter it was reiterated that:

> . . .by successive openings within thepast few years their reservation has been reduced to less than one-fourth of its original area. . .*This leaves within the diminished reservation at this time the lands in Todd County only*. . . Letter, *supra*.

Evidently, someone, somewhere, put an effective halt to the legislation, and no legislation for the sale or cession of the Rosebud Reservation ever again received consideration by Congress.

In any event, appellee would submit that the above materials not only add considerable dimension to what the Congress, members of the Rosebud Sioux Tribe, and Department of the Interior, and the Office of Indian Affairs meant by the term "diminished Rosebud Reservation" in the early 1900's, but they also should serve to illustrate the precise "effect" the three acts presented herein had on the original boundaries of theRosebud Reservation.

III. THE DOCUMENTS AND STATUTES CONCERNED WITH MELLETTE COUNTY AFTER THE PASSAGE OF THE 1910 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED AGAIN

In addition to all of the 1911-1913 materials immediately above, the 1910-1920 era is replete with similar evidence.

1. Report of Commissioner of Indian Affairs, 32 (1910):

> Department of the Interior
> Office of Indian Affairs
> Washington, November 1, 1910
>
> Sir: I have the honor to transmit herewith the Seventy-ninth Annual Report of the Office of Indian Affairs covering the period July 1, 1909, to June 30, 1910. . .
> Rosebud, S. D. . .*This reservation has been diminished previously by various acts of Congress*, and the act of May 30, 1910 (36 Stat., 448), authorizes the *disposal* of a part of this reservation lying within Mellette and Washabaugh counties. . .

> Respectfully,
>
> Robert G. Valentine
> Commissioner
> (emphasis added).

2. Act of March 3, 1919, 40 Stat. 1320:

> (a) *Be it enacted*, etc., That the Secretary of the Interior is hereby authorized to sell and convey to the White River Cemetery Co., for cemetery purposes, for a price not less than the appraised value thereof, a 10-acre tract within the *former Rosebud Indian Reservation in Mellette County*, S. D. described as the northeast quarter of the southeast quarter of the northwest quarter of section 34, township 42 north, range 29 west, sixth principal meridian, or such part thereof as may be required: *Provided, however*, That the tract conveyed shall be described in terms of the legal survey, the consideration to be paid to the superintendent of the Rosebud Reservation, to be deposited in the Treasury of the United States to the credit of the Rosebud Indians (emphasis added).
>
> (b) S. Rep. No. 745, 65th Cong., 3rd Sess. 1-2 (1919).

H.R. 12082 was introduced for the purpose of selling 10 acres of land belonging to the Rosebud Sioux Tribe in Mellette County, South Dakota, to the White River Cemetery Company. Included in the report on the bill is a letter to Hon. Charles D. Carter, Chairman, Committee on Indian Affairs, House of Representatives, from Alexander T. Vogelsang, Acting Secretary of the Interior, June 7, 1918:

> My Dear Mr. Carter: I am in receipt of your letter of May 14, 1918, inclosing (sic) for report H.R. 12082, a bill authorizing the sale of certain lands in South Dakota for cemetery purposes, and in response thereto I have the honor to submit the following:
> The bill proposes to convey for cemetery purposes a 10 acre tract within the *former Rosebud Indian Reservation in Mellette County*, S. Dak., described as . . .Said land was opened to settlement and entry under the act of May 30, 1910 (36 Stat. 448) which provides that the proceeds of the sale of the lands in said *former Indian reservation* shall be deposited to the credit of the Indians thereof and that the disposal of the land by the United States shall be in trust for their benefit. . .(emphasis added).

Although the counties were not able to locate and compile the same amount of material for the 1910 confirmation section that was presented in the 1904 and 1907 sections, we did find two references of a later date that aptly summarized the total effect of the Rosebud legislation on the size of the Rosebud Reservation.[15] In 1940 Dr. Green described that effect as follows:

15. Part of the difficulty in locating material for this section was due to the fact that the counties were unable to obtain certain volumes which would have contained additional material on Mellette County. Specifically, the counties have in mind the Rosebud Agency Reports and Public Land Decisions. To a lesser degree, this was also true in the 1904 and 1907 confirmation sections. Also See Note 8, *supra*.

> The breakup of the Rosebud Reservation began in 1904. In that year Gregory County (about 416,000 acres) was ceded. In 1907 Tripp County, with an area about twice that of Gregory County, was transferred to the Government, and opened for settlement the following year. And on May 30, 1910, Congress confirmed an agreement for the cession of all surplus lands in Mellette and Washabaugh counties belonging to the Rosebud Sioux. These three cessions *lopped off approximately three-fourths of the original Rosebud Reservation and leaves, at the present time, only the area within Todd County as a closed reservation*. . .XX STATE DEPT. OF HISTORY, SOUTH DAKOTA HISTORICAL COLLECTIONS 34-35 (1940). The cited source contains the Doctoral dissertation of Charles Lowell Green entitled "The Administration of thePublic Domain in South Dakota" (emphasis added).

On May 28, 1959, the Assistant Secretary of the Interior, Roger Ernst, in a letter to E. Y. Berry, more succinctly stated:

> . . . The *boundaries* of the Rosebud Indian Reservation *were changed* to eliminate Mellette County, and to show the *diminished reservation as lying in Todd County*. This is shown on the map of South Dakota published by this Department in *1918*. There remained, however, within Mellette County Indian allotments which were effective and did not come within the cession and opening under the 1910 act. The ceded lands fall within not only Mellette County, but *the adjoining counties* within the *former* boundary of the original Rosebud Indian Reservation. Letter from Rober Ernst, Asst. Secretary of the Interior to E.Y. Berry, May 28, 1959 (emphasis added).

With respect to a summary statement at this point, there is very little the counties could add to Mr. Ernst's letter. [16]

PART TWO

I. THE SEYMOUR AND MATTZ DECISIONS

> There will still be left a reservation containing about 1,000,000 acres [Todd County], and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of. H.R. Rep. No. 429, 61st Cong. 2d Sess. 2 (1910).

In 1910 Congress dictated that this was all that would remain of the original Rosebud Reservation, and for over 60 years Todd County has been considered to be *the* Rosebud Reservation. It is the position of appellee that neither *Seymour v. Superintendent*, 368 U.S. 351 (1962), nor the other recent decisions constitute a mandate to this Court that it must disregard the intent of Congress as evidenced by the passage of these three acts. The *Seymour* case did *not* hold

16. The 1918 map referred to in Mr. Ernst's letter, in addition to others, will be presented to the court.

that all acts similar to the one construed therin were not intended by Congress to diminish reservations. On the contrary, Justice Black specifically stated that:

> In *United States v. Celestine*, this Court said that "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." We are *unable* to find where *Congress* has taken away from the Colville Indians any part of the land within the boundaries of the area which *has been* recognized as their reservation since 1892. 368 U.S. at 359 (emphasis added).

Implicit in the second sentence, is a situation which certainly does not describe the Rosebud materials, for not only was the Supreme Court in *Seymour* unable to find evidence of congressional intent to take away from the Colville Indians any part of the land within the boundaries of the 1892 Colville Reservation, but what evidence they did find indicated that Congress consistently continued to recognize the reservation boundaries as established by the 1892 act. [17]

This is simply not thecase with the Rosebud materials and even the appellant in *Seymour* recognized the importance of such a distinction when at 11 in its brief he stated ". . .*there is no provision or legislative history relating to the Colville Act* which shows that Congress intended to change the Colville boundaries *as it did the boundaries of the South Dakota reservations*." B.A. at 11. *Seymour v. Superintendent*, 368 U.S. 351 (1962) (emphasis added).

Nothing in the *Seymour* opinion can be construed in such a manner to indicate that the United States Supreme Court did not or would not continue to recognize this distinction. Indeed, the counties would submit that it was for this very reason that the opinion continually referred to only the situation that the court found to exist in the Colville materials. In addition, there is not so much as even a footnote casting doubt upon what was then the highly regarded line of cases from the Eighth Circuit and the State of South Dakota. As a matter of fact, the only reference to any case concerned with a South Dakota reservation in the entire opinion is in footnote 19, wherein Justice Black cites *with approval* the Eighth Circuit case of *United States v. Frank Black Spotted Horse*, 282 F. 349 (8th Cir. 1922). In *Spotted Horse* the Federal District Court of South Dakota held that Todd County "*in the absence of an act of Congress opening that country to settlement, and disintegrating thereservation, remarking and changing the reservation boundaries, marking the changes, or abolishing it entirely*" (282 F. at 352 [emphasis added]), was still the Rosebud

17. "That this is the proper construction of the 1906 Act finds support in subsequent congressional treatment of the reservation. Time and time again in statutes enacted since 1906, Congress has explicitly recognized the continued existence as a federal Indian reservation of this South Half or diminished Colville Indian Reservation." 368 U.S. at 356.

Reservation and all land within it was subject to the jurisdiction of the United States.

Although Justice Black undoubtedly cited the case only for a specific reason,[18] the tenor of the whole decision was that under the then *established law*,[19] Todd County was *the* Rosebud Indian Reservation. Gregory, Tripp, Lyman and Mellette County are not even mentioned in the *Frank Black Spotted Horse* decision.

It would seem to the counties that *Frank Black Spotted Horse* would be a questionable case at best to cite with approval, if the Supreme Court intended *Seymour* to be construed in such a manner as to virtually destroy the 30 years of South Dakota reservation case law in the Eighth Circuit.

In any event, for the Court to hold in *Seymour* that the Colville Act was not inconsistent with the continued existence of the reservation boundaries is one thing. The statement appearing in appellant's brief below at 18 is quite another:

> The Court's decision, presumably made with the above historical circumstances in mind, was that the Colville Act, in opening the surplus and unallotted land on that reservation to non-Indian settlers, did not *expressly* disestablish or diminish the Colville Reservation, and that, because it had not do[sic] so *expressly*, it had not done so at all. B.P. at 18 (emphasis as in original).

Not even the recent decisions have gone so far as tocite *Seymour* for this proposition, let alone state it as the "decision" of the court. Appellee notes that although the *Seymour* opinion did use the word "expressly" in two instances, the first was not even related to plaintiff's statement:

> This Act did not, however, purport to affect the status of the remaining part of the reservation, since known as the "South Half" or the "diminished Colville Indian Reservation," but instead expressly reaffirmed that this South Half was "still reserved by the Government for their" (the Colville Indians') use and occupancy." 368 U.S. at 354.

In the second, Justice Black was merely noting the difference between the 1906 and 1892 Act when he stated:

> Nowhere in the 1906 Act is there to be found any language similar to that in the 1892 Act expressly vacating the South Half of the reservation and restoring that land to the public domain. 368 U.S. at 355.

Had Justice Black thought it necessary to state the holding in a manner even approaching the force of appellant's statement, he was certainly capable of doing so. In any event, in *Mattz v. Arnett*, *supra*, the United States Supreme Court disposed of this phase of appellant's argument by succinctly stating that "A congressional determination to terminate must be expressed on the face of the act or be clear from the surrounding circumstances and legislative history" and was as the case in *Seymour*, nothing else in the *Mattz* opinion can be fairly said to constitute a mandate to this Court that it must disregard what is clear from the surrounding circumstances and legislative history of the three Rosebud acts. 412 U.S. at 481 (1973) (emphasis added). In this respect, as in all others, the findings of and the material considered by the court below indicating that the:

> . . .Surrounding legislative history and the circumstances *clearly* indicate a congressional intent to separate each of the counties concerned, to return those counties to the public domain, and to extinguish the reservation or 'Indian land' nature of those counties thereafter.

from the Rosebud Reservation is wholly consistent with the standards set forth in *Mattz*. A.A.I at 74-75(emphasis as in original).

In addition the whole of the *Mattz* opinion is so intrinsically involved with the peculiar fact situation preceding the 1892 act construed therein that the general statements such as " 'The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was terminated' " which appellant has extracted to indicate a consistency between the allotment provisions in the 1892 Act and the Rosebud Act and to discredit the analysis of the court below are of no provative value whatsoever. B.A. at 23. This is especially so in light of the additional fact that appellant's attempt to discredit the analysis of the court below is founded upon a misreading of the fact situation in *Mattz*. Appellant's statement that "Prior to the 1892 Act in *Mattz* there had been no recognized reservation" simply doesn't square with Justice Blackmun's reognition that "Just a few weeks before the bill (H.R. 38, 52d Cong. 1st Sess.), which eventually became the Act, was reported out of committee on February 5, 1892, H.R. Rep. No. 161 52nd Cong., 1st Sess., the President had formerly extended the Hoopa Valley Reservation to include the Klamath River Reservation." B.A. at 24. 412 U.S. 481 (1973).

The appellee finds the *Mattz* opinion very important in one other respect which has not been mentioned to date in the most recent opinions: the two citations, with approval to the 1916 United

18. The Frank Black Spotted Horse opinion rejected the "checkerboard" concept of criminal jurisdiction within Todd County.

19. *United States v. LaPlant*, 200 F.92 (D.S.D. 1911).

States Supreme Court case of *United States v. Nice*, 241 U.S. 591 (1916). In *Nice*, the Court was presented with another case in which the status of a member of the Rosebud Sioux Tribe was involved--only this time it was an allottee "in Tripp County, South Dakota" (241 U.S. at 591). As was the case in *Frank Black Spotted Horse, supra*, one cannot read the *Nice* decision without concluding that the court was concerned with the status of an allottee *outside* of the boundary of the Rosebud Reservation, who was involved in a sale of an intoxicating beverage.

Early in the opinion the court states that "the sale was made August 9, 1914, *in Tripp County, South Dakota*" and that the allotment to this Indian was . . made from the tribal lands in the Rosebud Reservation, in South Dakota, under the Act of March 2, 1889. . ." 241 U.S. at 591 (emphasis added). Nowhere in the opinion does it even imply that Tripp County was still in the Rosebud Reservation. To the contrary, the court addresses itself to the question, prefacing its discussion on the merits with:

> The power of Congress to regulate or prohibit traffic in intoxicating liquor with small tribal Indians within a state, *whether upon or off an Indian reservation*, is well settled. It has long been exercised, and has repeatedly been sustained by this court

and cites cases specifically dealing with the status of an allotment and an allottee, who were then outside the boundaries of a reservation. 241 U.S. at 591 (emphasis added). *See, United States v. Pelican*, cited in Footnote 1.

Although Justice Blackmun, as Justice Black did in *Seymour* with *Frank Black Spotted Horse*, undoubtedly cited the case only for a specific reason, one fact remains the same: In 1916 Todd County was the Rosebud Reservation under the then established case law and the United States Supreme Court in *Nice* impliedly recognized it as such.

In addition appellee would merely note that if the United States Supreme Court had intended *Mattz* to effectively decide all cases in which a portion of a reservation was "opened" to homesteading, the court would not have called attention to the fact that an opening of a reservation could terminate or disestablish that reservation ("It is clear from the text, *infra*, that there were efforts in certain quarters of the House *to terminate the reservation and open it for white settlement*") and most certainly would not have set forth the most significant, if not the only general guide-line for construction in the whole decision: "a congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." 412 U.S. 481 (1973) (emphasis added). Under this standard, the specific

documents presented herein should be just as persuasive today as they would have been before *Mattz* was decided.

II. THE RECENT DECISIONS

In its brief to the court below appellee stressed the very unique attributes that the Rosebud documents possess for assisting any court in resolving an issue similar to the one presented herein. Primarily, appellee's position was founded upon the belief that:

1. Because the Rosebud Reservation was the first reservation to which Congress applied its new policy in the specific form of the 1904 Act, the legislative and historical materials were more detailed than the materials surrounding the later acts.

2. Because the Rosebud Reservation was the target of three separate acts, and these separate acts were all the subject of one declaratory judgment action, the court would have the unique opportunity of viewing the acts both retrospectively and prospectively.

Basically, appellee's position remains the same before this Court. However, in the court below we also noted that since the other courts recently construing similar acts had not shared this position, too much reliance had been placed upon the *holding* of *Seymour, supra*, and so we preceeded to analyze in detail the arguments presented to and accepted by those courts. Because the *Condon* and *Feather* opinions of this Court do not indicate a further reliance upon the arguments presented below however, this phase of the brief below will not be presented to this Court.

By way of an analysis of the *Condon* and *Erickson* opinions, appellee will stand primarily upon the two unique attributes it believes the Rosebud materials to possess to aid this court in resolving the effect the *Rosebud Acts had upon the Rosebud Reservation*. In *Condon*, this Court noted that it was "admittedly a close question" and that a "resort to the applicable contemporaneous and subsequent legislative history" was "not helpful," and further that "each case, of course must be decided under the applicable statute and upon its own facts." 478 F.2d at 687, 688, 689.

Appellee would submit: that the Rosebud Reservation is a separate case to be decided under the applicable statute and upon its own facts; that resort to the applicable contemporaneous and subsequent legislative history of the Rosebud Reservation is helpful; and that, in fact, a reading of the Acts, their legislative history, and subsequent congressional treatment does require the opposite conclusion in this case. Since the question is not close a holding "favoring Federal jurisdiction is" *not* required. 478 F.2d at 685, 686, 687, 688, 689.

In *Feather, supra*, this Court reiterated: that "nothing that can be gleaned from the legislative history or subsequent legislative enactments can be fairly said to shed any further light upon the intent of Congress regarding the reservation boundaries"; that the "later congressional enactments" were not even "admittedly inconsistent and confusing"; and that it was "noteworthy that the South Dakota Supreme Court, while interpreting an Act similar to the Act in issue here, has recognized the principles established in *Seymour* and *New Town* and denied state jurisdiction in an analogous situation. *State v. Molash*, 199 N.W. 2d 591 (1972)."

The appellee would submit: that the Rosebud Documents are replete with probative evidence that can be gleaned from the legislative history and subsequent legislative enactments; that this material can certainly be fairly said to shed further light upon the intent of Congress regarding the Rosebud Reservation boundaries; and that the body of legislative documents concerning the Rosebud Reservation does, against the glare of *Seymour* and the more recent judicial guidance in *Mattz, Condon* and *New Town*, nevertheless demonstrate something more than mere "congressional inattention to disestablish the" Rosebud Reservation. The South Dakota Supreme Court would not ascribe its "noteworthy" *holding* in *Molash* to the Rosebud Reservation in light of this or similar legislative history. *Cook v. State of South Dakota*, No. 11326-2-FGD (S.D., filed Mar. 13, 1974).

III. THE RECENT DECISIONS AND THE "PREPOSITION" ARGUMENTS [20]

Although arguments of this nature have been relied upon less and less in the more recent opinions, there still continues to be some importance attached to certain prepositions describing the location of certain land as within, in, or on the reservation. For example, while the *Condon* opinion omits all reference to this aspect of the arguments, the preposition argument surfaces again, albeit briefly in the *Feather* opinion:

> "President Harrison in his Proclamation opening the lands 'within the Lake Traverse Reservation' to settlement (emphasis supplied) 27 Stat. 1017. This reference is by no means conclusive. 489 F.2d 99 (1973).

In the court below, appellant relied extensively on this argument and to fully appreciate the extent of this reliance, one need only refer to those sections of its brief wherein this argument was used not only to support the statement that "the three acts repeatedly refer to the Rosebud

20. The introduction to this argument and its inapplicability to the Gregory County materials is discussed at 5, *supra*. The material therein should be read in conjunction with the material set forth in this section.

Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist *as such*" but also to support the proposition that "at least two presidents have interpreted the three acts not to have diminished the Rosebud Reservation." B.P. at 24, 44, 45 (emphasis as in original).

In appellant's brief to this Court, most of this argument has been abandoned, although a portion is retained in appellant's attempt to render the very persuasive subsequent congressional enactments and other materials presented in this brief "inconsistent, inconclusive and for that reason not a reliable indicator of congressional intent." B.A. at 59. Although appellee definitely does not think that one citation and appellant's "Indian oriented statute" argument even approaches rendering the Rosebud documents "inconsistent," some comment would nevertheless appear necessary. Appellee will discuss the different phases of this preposition argument under the following subheadings:

A. THE ACTS

This phase of the preposition argument has its genesis in footnote 11 of the *Seymour* opinion wherein four sections of the Colville Act were cited for the proposition that the Colville Act repeatedly referred to the Colville Reservation "in a manner" that indicated that Congress intended that the Colville Reservation continue to exist as such. 368 U.S. at 355. Justice Black did not specifically refer to any phrase within these sections nor did the opinion explain what was meant by "in a manner." Appellant in the court below had presumed that the court was referring to phrases within those sections such as "on said reservation" and therefore extracted similar phrases from each and every section of the three acts. Although your appellee could not determine precisely what Justice Black meant, perhaps he thought the sections in some way referred to the continuing existence of a reservation which the state was maintaining would no longer exist at all.

In any event, appellee failed to see how the references cited by appellant below supported the proposition that "the three acts repeatedly refer to the Rosebud Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist *as such*." B.P. at 45 (emphasis as in original). For example, it cited "of the said Rosebud Reservation" from Section 2 of the Mellette County Act. B.P. at 44. That section states in part:

> Provided, That prior to said proclamation the allotments within the portion of the said Rosebud Reservation to be disposed of as prescribed herein shall have been completed. . . Act, *supra*, Section 2.

The appellee would submit that this, or any other reference to the continuing existence of the Rosebud Reservation in the three acts, is *not* probative of the issue to be decided in this case for the simple reason that appellee is not, as was the case in *Seymour*, maintaining that the entire reservation would cease to exist.

Not one word of explanation of appellant's rationale below appears in its brief other than: "Therefore, since the United States Supreme Court cites the above language of the Seymour Act in support of the proposition that. . .then the nearly identical language in the three acts *must* support with equal force that . . . ." B.P. at 45 (emphasis added). Why? Unless the mere fact that theColville Act contains the phrase "of the said reservation" and the Mellette County Act also contains the phrase "of the said reservation" is supposed to be probative of *something*, appellee sincerely fails to see how this in any way supports the proposition that the acts "repeatedly refer to the Rosebud Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist *as such*." B.P. at 45 (emphasis as in original).[21]

Evidently the courts in the recent cases of *New Town*, *Molash*, *Condon*, *Mattz* and *Feather* have not considered similar phrases appearing in those acts probative of the diminution issue either. None of the opinions even mentions them.

B. THE PROCLAMATIONS

Nor could appellee agree that the Presidential Proclamations indicate "at least two Presidents have interpreted the *three* acts not to have diminished the Rosebud Reservation." B.P. at 24 (emphasis added).

1. 1904 Proclamation–Although appellant below actually conceded that from the language therein "one might infer that Roosevelt did contemplate a diminished Rosebud Reservation" (B.P. at 25), its statement remained "two presidents have interpreted the *three* acts not to have diminished the Rosebud Reservation." B.P. at 24 (emphasis added). How appellant eventually arrived back at the *three* act figure was illustrative of the rather tenuous nature of many of appellant's arguments below. In essence it stated: that Roosevelt nearly duplicated the language Congress used inthe 1904 Act; that the 1904 Act is ambiguous and is subject to its "ambiguity" rule; and that therefore President Roosevelt's 1904 Proclamation should be equally subject to this

21. The Gregory County Act prepositions do not even have this dubious distinction for they, as stated at 31, *supra*, are all from Article IV of the 1904 Act, which is *the* Article IV of the original 1901 lump-sum cession agreement.

rule. Hence, from *two* acts back to *three* acts! B.P. at 25. Your appellee would submit that the use of this type of analysis to support a statement that the 1904 Proclamation indicates President Roosevelt interpreted the 1904 Act not to have diminished the Rosebud Reservation is, at best, questionable.

2. 1907 Proclamation–The only support for appellant's statement below in this instance was the "of" in the first paragraph of the 1907 Proclamation:

> Whereas by the Act approved March 2, 1907 (34 Stat., 1230), the Congress directed that all that part *of* the Rosebud Indian Reservation lying south of the Big White river, and east of Range 25 west, of the Sixth Principal Meridian, except all Sections 16 and 36, which were granted to the state of South Dakota, and excepting also such parts thereof as have been or shall hereafter be either allotted to Indians, selected by said state, or reserved for townsite purposes, be disposed of under the general provisions of the homestead laws of the United States, and be opened to settlement, entry and occupation only in such manner as the President might prescribe by proclamation;
>
> Now, therfore, I, Theodore Roosevelt, President of the United States, by virtue of the power and authority vested in me by said Act of Congress, do hereby prescribe, proclaim and make known. . . .Act of August 24, 1908, 35 Stat. 2203 (emphasis added).

In the first place, appellee would submit that a singular unexplained "of" hardly supports an unequivocal statement that the Proclamation indicated that President Roosevelt *interpreted* the 1907 Act not to have diminished the Rosebud Reservation–and this "of" is not even of that status (i.e. unexplained). The source of the "of", as well as most of the entire paragraph, *is exactly where* appellant in the court below surmised President Roosevelt extracted his bad 1904 Proclamation language from: *the act itself*.

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby authorized and directed, as hereinafter provided, to sell or dispose of all that portion *of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of range twenty-five west of the sixth principal meridian, except such portions thereof as have been, or may hereafter be, allotted to Indians*
> Provided, That sections sixteen and thirty-six of the lands in each township shall not be disposed of, but shall be reserved for theuse of the common schools andpaid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose.
>
> Sec. 2. That the land shall be disposed of by proclamation, under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President. . . Act of March 2, 1907, 34 Stat. 1230 (emphasis added).

Until appellee noticed appellant's explanation of the source of the phraseology in the 1904 Proclamation, they were admittedly somewhat concerned, not so much with the 1907

Proclamation,[22] as with the 1910 Proclamation. The explanation that the acts, referring to land to be disposed of as "'within" or "a part of" the Rosebud Reservation, were the source of the phraseology appearing in the Proclamations, was indeed welcome.

3. 1910 Proclamation—Again, the only support for appellant's statement below was a singular preposition, in this instance "within", appearing in the 1910 Proclamation:

> I, WILLIAM H. TAFT, President of the United States of America, by virtue of the power and authority vested in me by the Acts of Congress approved May 27, 1910 (36 Stat. 440), and May 30, 1910 (36 Stat. 448), do hereby prescribe, proclaim and make known that all the non-mineral, unallotted, unreserved lands *within* the Pine Ridge and Rosebud Reservations in the State of South Dakota, which have been classified under said Acts of Congress into agricultural land of the first class, agricultural land of the second class, and grazing land shall be disposed of under the general provisions of the homestead laws of the United States and of said Acts of Congress, and be opened to settlement and entry, and be settled upon, occupied and entered in the following manner, and not otherwise: . . .Act of June 29, 1911, 37 Stat. 1691. . . (emphasis added).

As in the 1907 Act, appellee would submit that this singular "within" hardly supports an unequivocal statement that the Proclamation indicated President Roosevelt *interpreted* the 1907 Act not to have diminished the Rosebud Reservation. Although the precise source of the "within" cannot be fixed as conclusively as was the "of" in the 1907 Proclamation, perhaps because of the dual nature of this particular proclamation, the 1910 Act does contain a number of "withins".

In any event, this whole process of building upon a singular preposition in a proclamation to support the statement that the proclamation indicated that the President *interpreted* the act not to have diminished the reservation; and from there to the main title that "Those chiefly responsible for the administration of the three acts do not regard the three acts as having diminished the Rosebud Reservation," was illustrative of the quantity and quality of the material upon which appellant relied below.

The only other material appellant could muster below to support this statement was (1) the mere fact that in 1934 the Secretary of the Interior approved the Tribes constitution—*"The Secretary of the Interior has interpreted the three acts as not having diminished the Rosebud Reservation"* (B.P. at 24, 25) and (2) that in 1972 the Field Solicitor of the Bureau of Indian Affairs, Aberdeen, South Dakota, issued a memorandum consonant with appellants views (B.P. at

22. The relation between the "preposition" argument and the "open" terminology is discussed at 72 *infra*

26, 27). Hence, "Those chiefly responsible for the administration of the three acts do not regard the three acts as having diminished the Rosebud Reservation" (B.P. at 24). In its brief to this Court, appellant has cited the same identical material for the propositions that *"1. The Secretary of the Interior treated the Rosebud reservation as embracing the territory delimited in the 1889 Act."* and *"2. The Secretary of the Interior approved the tribal Constitution defining the reservation as originally established."* B.A. at 54 (emphasis as in original). Appellee would submit that these are not exactly the type of administrative interpretations that are entitled to great weight, in this case where a portion of the reservation did continue to exist, to say the least. The Department of the Interior's position in this respect is made quite clear in the documents written before and immediately after the passage of the three acts.

C. THE LATER MATERIALS

But for the reliance upon this "preposition" argument, appellee would not have indulged in picking these materials apart in an attempt to explain each and every preposition. Indeed, if it had to rely solely on this process and thereby necessarily disregard the tenor of the whole transaction, appellee would eventually come to a situation like that on page 1853 of the Congressional Record where the following title and remarks appear:

> Extension of time to Homestead Settlers *on Rosebud Reservation S. Dak., etc.*
>
> Mr. MARSHALL. Mr. Speaker, I ask unanimous consent for the present consideration of the bill which I send to the desk.
> The SPEAKER. The gentleman asks unanimous consent for the present consideration of the bill the title of which the Clerk will report.
>
> The Clerk read as follows:
>
> A bill (s. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were *heretofore* a part of the Rosebud Indian Reservation with the limits of Gregory County, S. Dak.
>
> . . .
>
> Mr. UNDERWOOD. Mr. Speaker, reserving the right to object, I would like to ask the gentleman as to whether this bill increases the size of the homestead?
> Mr. MARSHALL. No, sir; it does not. This bill simply gives to the settlers *on* the. . .Rosebud Reservations, which were opened by proclamation last fall, an extension of time of about sixty days, until May 1, to move on their lands and make improvements.
> Mr. UNDERWOOD. It does not increase the size of the homestead?
> Mr. MARSHALL. Not the slightest. . . 39 Cong. Rec. 1853 (1905) (emphasis added).

Your appellee would then be at a loss for an exact explanation as such for Congressman

Marshall's indiscriminate use of the preposition "on" and hence doomed to defeat. However, in light of the plain language of *this* statute, the House Report, the Senate Report, the title and remarks of Senator Gamble in the Congressional Record, and the information in the Interior documents,[23] appellee would *still* submit that, *in its entirety*, the judiciary could not expect a more relevant, consistent, clear, immediate, and unequivocal congressional confirmation that the 1905 "extension" statute and peripheral materials concerned therewith.[24]

The counties would also submit, that to view such prepositions in any other manner, and then either raise them to the status of an ambiguity and resolve the entire issue contrary to appellee's position, *or even worse*, consider such prepositions as evidence of a congressional intent present in 1904 *not* to diminish the reservation, would be to completely nullify that effect which Congress considered an almost obvious corollary of the act itself.

The final aspect of the preposition argument remaining to be discussed is its use in conjunction with "opened" reservation terminology. At *supra*, appellee has already discussed the fallacious nature of the mystical equation of this terminology with the trustee-homestead provision which supposedly "opened"a reservation without diminishing the size or boundary of that reservation. The combination of the two are illustrated in the following hypothetical 1905 statute:

> Chap. 178. An Act for the sale of isolated tracts in the *former* Rosebud Reservation.
>
> Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that the provisions of Section 1000 of the Revised Statutes of the United States as amended by the Act of May 31, 1904, relating to the sale at public auction of isolated tracts of the public domain, be, and the same are hereby extended and made applicable to lands *within* the portion of the Rosebud Indian Reservation, South Dakota, *opened* under the Act of April 23, 1904. . (emphasis added).

It is to be noted that the last part of the statute does not say "to lands [now] within the portion of the Rosebud Indian Reservation, South Dakota, *opened* under the Act of April 23, 1904" *nor* does

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23. These materials are set forth at , *supra*.

24. The counties would call to the Court's attention the manner in which the subheadings in the Congressional Record correspond to the remarks of the Senators and Representatives. In this instance, Marshall refers to settlers *on* the Rosebud and the subheading in the Congressional Record refers to settlers *on* the Rosebud. Senator Gamble, however, more explicitly refers to the extension of time which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation and the title in the Congressional Record merely states "Extension of time to Homestead Settlers." See 30, *supra*.

ay "to lands [formerly] within the portion of the Rosebud Indian Reservation, South Dakota, *ened* under the Act of April 23, 1904." In fact appellee would submit that the sentence is merely tatement of the issue to be decided, i.e. whether the lands within the portion of the reservation, ened under the Act of April 23, 1904, are now within the reservation. In this context the ithin" is meaningless and to equate "opened" with either diminished or non-diminished would be lassical example of begging the question.

The Rosebud hypothetical is included in this brief only to point out how the preposition ument in combination with the "opened" terminology, could lead one to find inconsistencies ere none exist and thereby disregard whatever probative value a later statute referring to a ormer" reservation might have.

As to the later statutes which are truly inconsistent within themselves or, for that matter, any er reference where the lands in question are still being referred to as "within" or "on" or "in" the ervation, your appellee would submit that this could be either a *direct result of the titles and tions of theoriginal acts themselves, referring to the lands in this manner* or as was the case in *ttz*, merely a "natural, convenient, and shorthand way of identifying the land subject" to the . 412 U.S. 481 (1973). For example, the 1907 Act entitled "Act to open to settlement surplus unallotted lands *in* the Rosebud Indian Reservation" (emphasis added) or the 1910 Act entitled ct to authorize the sale and disposition of a portion of the surplus and unallotted lands *in* llette and Washabaugh counties *in* the Rosebud Indian Reservation." The other prepositions are ttered at random throughout the entire text of the three acts.

For any person drafting legislation or commenting upon the original act to refer to the phrases earing in the original act or to use this shorthand term of identification, would certainly seem to just as plausible as the alternative: that the entire Congress and just about everybody else ncerned was so incompetent that they could not refer to a piece of legislation or draft a o-sentence bill concerned therewith without the same being either "internally inconsistent" or onsistent with other similar legislation or remarks they had made the previous day.

THE STATUS OF THE OPENED ROSEBUD LANDS

There are two related aspects of appellant's position on this issue which merit some extended cussion.

A. INDIAN TITLE

Using the somewhat questionable phrase "Indian title" to describe a beneficial interest which it maintained the Indians retained in the opened lands until they were disposed of, in the court below appellant stated that "Surely the prospect of lingering Indian title is incompatible with the notion of a diminished reservation." B.P. at 40. Along these same lines at 47 it reiterated:

> These surplus lands and unallotted lands in Mellette County did not become part of the public domain because the Rosebud Sioux retained an equitable interest in those lands until and unless the entryman perfected his entry. B.P. at 47.

In this Court appellant has raised similar arguments throughout its entire brief. [25] The case of *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), and other cited by appellant below and in this Court that "made this distinction clear" (B.P. at 47) were not concerned with the Rosebud Reservation or even the issue with which this Court is presented. The cases have not been cited in or relied upon by either *Seymour* or the recent decisions. Nevertheless, appellant still maintains the Rosebud Sioux retained an equitable interest in these *opened* lands.

It is appellee's position that *Congress* intended the three acts to extinguish all "Indian title" to the extent that the primary interest that remained was the right, as provided in the act, to the proceeds as the lands were disposed of. The 1912 Report of the Commissioner of Indian Affairs not only conclusively supports this position, but also reveals the *source* of some of the confusion in this particular area:

> Under various acts passed by Congress within recent years certain lands ceded by the Indians to the United States are open to settlement and entry, and the Government endeavors to dispose of them at their appraised value for the benefit of the Indians.
>
> Nearly all of such acts contain a clause practically identical with the following:
>
> > That nothing in this act shall in any manner bind the United States to purchase any portion of the lands herein described, * * *or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided.
>
> It has been the practice to consider such lands under the jurisdiction and supervision of the General Land Office from the passage of the act, and the *Indians' title thereto extinguished*. On this theory the public at large has come to consider *said lands a part of the public domain*, and the lands have therefore been used indiscriminately by various interests, principally for grazing purposes, without compensation to the Indians.
>
> By departmental decision of November 27, 1911, it was held in effect that the Indians' title to such lands is not extinguished until date of entry, settlement, or sale, and the Indians are entitled to their use, or to any revenue that may be derived from their use by others, pending date of settlement, sale, or entry. Report of the Commissioner of Indian Affairs, 51 (1912).

As the report indicated, until *1912* it had been the practice to consider the Indians' title extinguished from the date the act was passed. In this respect the lands were considered a part of the public domain and therefore under the jurisdiction and supervision of the General Land Office. By departmental decision of November 27, 1911, however, the *department, not* Congress, decided to affect a procedural change in order to compensate the Indians for the use of the lands pending date of settlement, sale or entry.

In the first place, it should be noted that the effect of the three acts on the status of the land (the extinguishment of Indian title) remained unaffected by this departmental policy, as the acts themselves were in essence the final word from *Congress* on this point. Also, an examination of the Rosebud materials presented elsewhere in this brief shows that time and time again, the members of Congress, the Department of the Interior, and the Commissioner of Indian Affairs, all attributed this extinguishing effect to the three Rosebud acts.

Secondly, the prospect of a lingering "Indian title" of the nature referred to in the above report, and which lasted *only* until the lands were disposed of, would *not* necessarily be inconsistent with the notion of diminished reservation.

Similarly, throughout appellant's brief below and in this Court various other indirect and direct references are made to the concept of public domain. These and other similar references could lead one to think that the only manner in which Congress was capable of disestablishing any portion of a reservation was by the process of *technically* restoring the lands therein to the public domain with the specific use of the public domain terminology necessarily appearing on the face of the act as "words of art." Although the Rosebud materials do contain many references to the three acts restoring the open lands to the public domain, appellee does not necessarily agree that this is the *only* manner in which Congress could extinguish or diminish a reservation.

Specifically, your appellee has in mind and deems significant a statement by Judge Blackmun, now Justice Blackmun of the United States Supreme Court, appearing in the opinion of *Beardslee v. United States*, 387 F.2d 280 (C.A.8, 1967), [26] a decision of this Court made *after* the *Seymour*

25. One aspect of the argument was discussed at 9, *supra*.

26. Discussed at 77, *supra*.

decision. Justice Blackmun therein referred to the absence of Federal jurisdiction on non-Indian land "on a disestablished portion of the reservation, *however that disestablishment may have been affected.*" 387 F.2d at 286 (emphasis added).

In other words it is appellee's position that merely because some of the earlier cessions referred to a restoration of lands to the public domain and such cessions have since been held to have extinguished or diminished reservations, it should not be automatically assumed that unless a specific act or the legislative history thereof indicated an intent to technically restore lands to the public domain and these words appeared on the fact of the act, there could be no intent to extinguish or diminish that reservation. In fact, some of the earlier cessions which this Court has indirectly held to have extinguished portions of reservations would not conform to this standard. For example, the 1891 Fort Berthold Act.

V. INDIAN COUNTRY: 18 U.S.C. Section 1151

Many of the older decisions of the Eighth Circuit have been highly regarded in the field of Indian Law. This esteem has not only been recognized by judicial bodies in other states and the United States Supreme Court, but also by Congress. With specific reference to the effect of the homestead acts on the size of reservations in South Dakota, the case of *United States v. LaPlant*, 200 F. 92 (D.S.D. 1911), wherein Judge Willard stated that "No other meaning can be given to the words italicized ["thus diminished"] than that the reservations were diminished, and they were diminished by the act itself" (200 F. at 94), has been the cornerstone of this area of the law in this state for many years. Although the *LaPlant* case itself never achieved national prominence it was cited with approval in other cases that definately did. One such example was when the Eighth Circuit Court of Appeals decided *Kills Plenty v. United States*, 133 F.2d 292 (C.A.8 1943):

> In 1911, it was ruled in the case of *United States v. LaPlant*, D.C.S.D., 200 F. 92, that the federal court was without jurisdiction of the crime of murder committed on lands which were originally within the boundaries of the Cheyenne River Indian reservation but were excluded from the reservation by the Act of May 29, 1908, Chap. 218, 35 Stat. 460, diminishing the reservation. 133 F.2d at 294.

The question in *Kills Plenty* was essentially the same question presented in *Frank Black Spotted Horse*, *supra*, and it was resolved in the same manner. Although both cases were concerned only with checkerboard jurisdiction in Todd County, neither case even mentioned Gregory, Tripp, Lyman or Mellette County. Indeed, no one could have read *Kills Plenty* without concluding that Todd County was the only county considered to be within the boundaries of the Rosebud Indian Reservation at that time. Certiorari was later denied and when 18 U.S.C. 1151 was revised in 1948, *Kills Plenty* was cited therein as one of *the* cases on which the 1151(a) definition of Indian Country was based. Revisor's note preceding 18 U.S.C. Section 1151(1949). See also H.R. Rep. No. 304, 80th Cong. 1st Sess. A. 92 (1947). Therefore, at the time Congress defined Indian Country as "all land within the limits of any Indian reservation" (1151[a]) and based that definition in part on the *Kills Plenty* case, at least the revisors realized that Todd County was the only county considered to be within the Rosebud Indian Reservation. By enacting 1151(a) and to this extent, Congress *had* eliminated the impractical pattern of checkerboard jurisdiction in the only area of the Rosebud Indian Reservation they thought existed? [27]

But even in 1948, Congress realized that 1151(a) would not encompass all Indian allotments and so 1151(c) was set forth as an addition to the definition of Indian Country:

> All Indian allotments, the Indian titles to which have not been extinguished including rights of way running through the same. 18 U.S.C. Section 1151(c) (1949).

Appellee would submit, and as recently as 1967 this Court has so indicated, that *this is the only section of 18 U.S.C. 1151 that has been or was intended to apply to Gregory, Tripp, Lyman and Mellette counties. Beardslee v. United States*, 387 F.2d 280(C.A.8 1967).

Beardslee involved essentially the same issue that had been presented in *Kills Plenty* and *Frank Black Spotted Horse* and the same result followed. In two other respects, however, the case is very interesting. In the first place, it was decided *after* the Seymour decision and specifically mentioned Gregory, Tripp, Lyman and Mellette counties in a manner inconsistent with plaintiff's position:

> 1. The Rosebud Reservation was established by, and is described in, Section 2 of the Act of March 2, 1889, 25 Stat. 888. The boundaries of Todd County, in which the town of Mission is located, are laid down in S.D. Code, Section 12.0102 (1939). All of Todd County is obviously within the original boundaries of the Rosebud Reservation. Only three Acts of Congress have affected the *territory* of the reservation since its establishment in 1889 and none of these concern Todd County. Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448. No part of the Todd County portion has remained closed since 1889. *The general geographical situation is thus clear.* 387 F.2d at 285 (emphasis added).

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27. Other sections of the Revisor's note and H.R. Rep. No. 304, *supra*, also indicate that the men responsible for drafting Section 1151-1154 were very much aware of that were then the reservations in South Dakota. One can only imagine how these men, *after reading Kills Plenty* would have enacted had some Court in 1950, held that Gregory, Tripp, Lyman and Mellette counties were suddenly within the limits of the Rosebud Indian Reservation.

More importantly, the opinion referred to "a disestablished portion of the reservation, however that disestablishment may have been effected" (387 F.2d at 286), and specifically stated that:

> We regard clause (c) as applying to allotted Indian lands in territory *now open* and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent." Although this result tends to produce *some checkerboarding in non-reservation land*, it is temporary and lasts only until the Indian title is extinguished. 387 F.2d at 287 (emphasis added) [28]

As far as the counties have been able to determine, *Nice, Frank Black Spotted Horse, Kills Plenty*, and *Beardslee*, are the only cases wherein the Eighth Circuit has been presented with a question involving Indian jurisdiction on the Rosebud Reservation. In all four, one cannot read the Court's opinion without concluding that Gregory, Tripp, Lyman and Mellette counties were simply not considered to be within the limits of the Rosebud Indian Reservation.

Secondly, irrespective of how the general issue before this Court is ultimately resolved, there is no question that the court in *Beardslee* correctly interpreted 1151(c) as applying only to non-reservation situations. To this extent, 1151(c) specifically approved checkerboard jurisdiction. The Revisor's note and the House Report stated that "Indian allotments were included in the definition on authority of the case of *United States v. Pelican*". The *Pelican* case specifically held that after a reservation had in fact been diminished, the allotments outside the boundaries of that reservation were still Indian country and would remain Indian Country until Indian title had been extinguished. [29] Yet, in the *Seymour* opinion the following statement appears:

> For that argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed *within* the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of Section 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid. 368 U.S. at 358 (emphasis added).

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28. Most of the cases cited by appellant below in its brief at 22, 23, were specifically cited *with approval* in the *Beardslee* opinion. Indeed, Judge Blackmun, now Justice Blackmun of the United States Supreme Court, who authored the *Beardslee* opinion, even cited *LaPlant* approvingly. 387 F.2d at 286.

29. 232 U.S. 442 (1913). Revisor's note preceding 18 U.S.C. Section 1151 (1949). *See also* H.R. Rep. No. 304, 80th Cong., 1st Sess. A 92-94. (1947).

Although Justice Black was concerned only with the rejection of checkerboard jurisdiction *within* the boundaries of a reservation, as the italicized portion of his statement indicates, the paragraph is still confusing in this respect: Federal jurisdiction does *not* depend solely upon the existence or nonexistence of a reservation. In the situation described in 1151(c), law enforcement officers will *still* have to "search tract books" and to this extent the "impractical pattern of checkerboard jurisdiction" has *not* been "avoided by the plain language of Section 1151."

In Gregory, Tripp, Lyman and Mellette counties, the law enforcement officers have searched the tract books for years. Until Congress decides otherwise, the counties would prefer to remain "non-reservation lands" irrespective of the temporary inconvenience of the impractical pattern of checkerboard jurisdiction as set forth in 1151(c). This is especially so in light of the alternative: that of being thrust within the boundaries of a reservation which the counties have not been within for over 60 years.

VI. PRIMARY SOURCES

On page 10 of its brief to this Court appellant has stated that the trial court brief of the defendant four counties was "heavily interlarded with *selected* excerpts from documentary material in support of their argument that Congress intended to disestablish the portions of the reservation affected by each of the three surplus land statutes of 1904, 1907 and 1910." B.A. at 10. Appellee would point out that although the excerpts were "selected" and were "in support" of its argument, they were definitely not *selected in support* of the argument as appellant would by innuendo, have this Court believe. Indeed, the very fact that approximately 20 pages of quoted material could be "in support" of our position, as appellant apparently concedes, would seem to shed some light on the plausibility of appellant's position even if it was founded upon the legislative history and surrounding circumstances of the period – which it wasn't below and isn't here.

In the court below, appellee did express the view that the arguments in the briefs to the courts in the *New Town, Moktish*, and *the Federal District Court* in *Condon*, were not founded upon the legislative history and surrounding circumstances and that appellant's brief below contained only similar arguments and was almost similarly silent with respect to *quotations or citations* to legislative history or to any of the surrounding circumstances. Of course appellant in its brief to this Court does cite to its admittedly excellent appendix, but the text of the brief itself discusses the material contained therein *only* in as far as absolutely necessary or where appellant erroneously

assumed it could quote something to its advantage and even these situations were few and far between. Finally, we agree with the appellant that "the search should not be for the remote, or the stretch for the obtuse." B.A. at 13. Certainly the debates in the Congressional Record and the House and Senate Reports on the very acts under construction, do not represent such a quest. As for the other materials, the United States Supreme Court in the *Mattz* opinion cited nearly everything in the briefs in addition to explicitly stating that the "meaning and effect" of acts such as the ones under construction herein "cannot be determined without some reference to the particular "Tribe" and "history of the reservation" prior to the passage of the act. *Mattz, supra.* What other means are available to determine whether or not " a congressional determination to terminate" is clear from the "surrounding circumstances and legislative history" (*Mattz, supra*) or that Congress by "clear implication" has "diminished the boundaries of the reservation." *Condon, supra*

In this respect your appellee would submit that the mass of miscellaneous correspondence of the Department of the Interior is an excellent source from which to ascertain the "surrounding circumstances" of the three Rosebud Acts. Similarly, what better source from which to ascertain precisely what effect the members of the Rosebud Sioux Tribe attributed to the three Rosebud Acts at the time than Inspector McLaughlin's reports, transcripts, and their own correspondence. As Felix Cohen has stated:

> A somewhat different, although related, rule of treaty interpretation is to the effect that, since the wording in treaties was designed to be understood by the Indians, who often could not read and were not learned in the technical language, doubtful clauses are resolved in a non-technical way as the Indians would have understood the language. . . .Although an interpretation of a treaty should be made in the light of conditions existing when the treaty was executed, as often indicated by its history before and after its making, the exact situation which caused the inclusion of a provision is often difficult to ascertain. New conditions may arise which could not be anticipated by the signatories to a treaty. A practical administrative construction of a treaty which has long been acquiesced in by Congressional inaction is usually followed by the courts. Cohen, HANDBOOK ON FEDERAL INDIAN LAW, ch. 3, Section 2 at 37, 38 (1942).

The "practical administrative construction" to which Mr. Cohen refers can also be determined, unequivocally and precisely by utilizing these same materials. Why must any court rely upon the mere fact that the agency continued to provide some services to those allotted in the opened areas which, by itself, is probative of nothing, as is the unfounded generalization that "certainly, contemporaneous with the statutes and thereafter, the United States did not regard any part of the Rosebud Reservation as disestablished." B.A. at 55, 56, 57. And how can one ascertain the "flavor of the archives material" (B.A. at 59) from this singular annual report of the Rosebud –

especially in light of the earlier reports such as the one of 1909 that were specifically addressed to the issue presented herein:

> The Rosebud agency is located on the southern boundary of South Dakota. *Originally* the reservation extended to the Missouri river on the east, a distance of 150 miles east and west, and 50 miles north and south, and contained about three and one-quarter million acres of land. By the act of April 23, 1904, that part now known as Gregory County, on the eastern end of the reservation, was ceded and the surplus or unallotted lands made available for homesteads. Under the act of March 2, 1907 (Public No. 195), a tract about 33 miles east and west and 50 miles north and south, known as Tripp County, and *east of the present diminished* reservation was opened to settlement. . . .
>
> What is now known as the *diminished* reservation is a tract about 50 miles square embracing the western part of the original reservation. . . .
>
> If the whole of the *diminished* reservation was attached to Tripp County for judicial purposes it would be much more convenient and expeditious. . . .
>
> The *diminished* reservation, containing about 2500 square miles, is wholly a cattle range – at present. . . .
>
> The burning of the grass on a great part of Tripp County early last winter found many of the cattlemen's stock to seek grass on the *diminished* reserve. . . .
>
> In order to keep the cattle of the *diminished* reservation from becoming reinfected by mingling with outside stock I have asked authority for material and labor to complete the south fence line, and to *construct* a fence along the Tripp County line to the 10th Parallel. Many thousands of posts and much labor have been expended in repairing the fences on the other *three* sides of the reservation this season and they are now in good condition.
>
> All theother day schools are located in the diminished reservation. . . .
>
> Many new towns have sprung up near the reservation boarders and in Tripp County. . . .
>
> C.L. Ellis
> Special Indian Agent
> in charge
>
> Report to the Commissioner of Indian Affairs, Annual Report of the Rosebud Agency, C.L. Ellis, Agent, 21-27 (1909) (emphasis added). . .

Or similar references or quotations. . .ad infinitum.

CONCLUSION

In appellee's words:

> This action seeks declaratory judgement as to the effect of these acts, 1904, 1907, 1910, on the size of the reservation. In truth, the action asks the Court to define for the parties the present boundaries of the Rosebud Indian Reservation. A.P. at 2.

The first part of this brief contains unequivocal probative evidence of the precise effect Congress intended these acts to have on the Rosebud Reservation; the second part contains an evaluation of the applicable case law and appellant's arguments.

The appellee has submitted that the applicable case law should not be construed as a mandate for this Court to disregard the effect, as evidenced by the materials in part one, that Congress intended the three acts to have on the Rosebud Reservation. Similarly, the material in part one was also relied upon to dispose of appellant's argument, a most sophisticated argument to be sure, but not to the degree that it could weather a full exposure to the Rosebud documents.

Admittedly, the method used by Congress to open the Rosebud Reservation was different from the method used by Congress in the 1800's. Nevertheless, with respect to the Rosebud Reservation, the concept of a reservation diminished remained the same and this concept permeates the Rosebud documents of the period. Appellant has not nor cannot produce sufficient material from a Rosebud source prior to 1911 to clearly support its position that Congress did not intend to diminish the Rosebud Reservation by the passage of the three acts. In the absence of such support to counter the intent expressed in the documents presented herein, appellee would submit that just as there was no occasion to continue a reservation larger than Todd County in 1910, there is no occasion to enlarge that reservation today.

The judment below should be affirmed.

APPENDIX

5. Act of Aug. 17, 1911, ch. 22, 87 Stat. 21 (S.3152):

> Be it enacted. . . That any person who has heretofore made a homestead entry for land *in what was formerly a part of the Rosebud Indian Reservation in the State of South Dakota*, authorized by the Act approved March second, nineteen hundred and seven. . .(emphasis added).

6. S. Rep. No. 115, 62nd Cong., 1st Sess., (1911), containing a letter dated August 2, 1911, from Samuel Adams, acting secretary of the Interior to Hon. Charles H. Burke, House of Representatives. Mr. Adams proposed a version of a bill to extend relief to settlers who had entered lands in Tripp County, South Dakota. The proposed bill read in part:

> That any person who has heretofore made a homestead entry in what was *formerly* a part of the Rosebud Indian Reservation in South Dakota, authorized by act approved, March second, nineteen hundred and seven, may apply to the register and receiver of the land office in the district in which the land is located, for an extension of time in which to make payment (emphasis added).

7. 47 Cong. Rec. 3841 (1911):

> Mr. Burke of South Dakota. . .Mr. Speaker, the bill H.R. 13044, which is the bill now under consideration, you will notice, proposes to affect lands in what was *formerly* the Rosebud Reservation and the Cheyenne and Standing Rock Reservations in North and South Dakota. The bill as amended in committee eliminates the Cheyenne and Standing Rock Reservations in North and South Dakota, because of no emergency existing as to those reservations at the present time (emphasis added).

8. 40 L.D. 54 (1911):

> NEWTON DEXTER BURCH.
> Decided April 26, 1911.
>
> ROSEBUD INDIAN LANDS - SOLDIERS' ADDITIONAL RIGHT.
>
> Lands in the *former* Rosebud Indian Reservation opened by proclamation of August 24, 1908, under the act of March 2, 1907, to disposal under the general provisions of the homestead and townsite laws, are not subject to appropriation by location of soldiers' additional right.
>
> PIERCE, First Assistant Secretary:
>
> Newton Dexter Burch has filed appeal from decisions of January 18, 1911, by the Commissioner of the General Land Office, holding for cancellation the final certificate and rejecting his several applications filed on or about October 8, 1909, under sections 2306 and 2307, R.S., for the different subdivisions of the SW ¼ of Sec. 27, T. 101 N., R. 76W., 5th P.M., containing 160 acres, Gregory, South Dakota, land district. The said tracts are a part of the *former* Rosebud Indian Reservation, opened by proclamation of the President, dated August 24, 1908 (37 L.D., 122), under the act of March 2, 1907 (34 Stat., 1230). . .(emphasis added).

9. 40 L.D. 267 (1911):

INSTRUCTIONS.
DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE
Washington, D.C. September 8, 1911.

Register and *RECEIVER*,
Gregory, South DAkota

GENTLEMEN: Your attention is directed to the provision of the act of Congress, approved August 17, 1911, (Public–No. 22), entitled "An act extending the time of payment to certain homesteaders *in* the Rosebud Indian Reservation, in the State of South Dakota," which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has heretofore made a homestead entry for land in what was *formerly* a part of the Rosebud Indian Reservation, in the State of South Dakota. . . . .

Very Respectfully,

John McPaul

Approved Samuel Adams
Acting Secretary
(emphasis added).

10. Act of Jan. 11, 1915, 33 Stat. 792:

AN ACT Providing for the purchase and disposal of certain lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, *in Tripp County, formerly a part of the Rosebud Indian Reservation in South Dakota.*

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County in what was *formerly within the Rosebud Indian Reservation* in South Dakota, as have heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such mineral lands (emphasis added).

11. 52 Cong. Rec. 453 (1914):

Mr. Burke of South Dakota. I will state that this bill originally as introduced, or a similar bill, was limited to *Tripp County, what was formerly part of the Rosebud Reservation* , . .

. . .so that it will be limited to lands in Tripp County, in what *was formerly within* the Rosebud Indian Reservation. . . .

. . .so that the bill will be limited to lands in Tripp County *formerly within* the Rosebud Indian Reservation (emphasis added).

12. 44 L.D. 195 (1915):

TRIPP COUNTY MINERAL LANDS - ACT JANUARY 11, 1915.

INSTRUCTIONS
(No. 425.)
DEPARTMENT OF THE INTERIOR

GENERAL LAND OFFICE,
Washington, July 15, 1915.

REGISTER AND RECEIVER
United States Land Office
Gregory, South Dakota.

SIRS: 1. The act approved January 11, 1915 (38 Stat., 792), provides that all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County, in *what was formerly within the Rosebud Indian Reservation in South Dakota*, as have heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such mineral lands, ...

Very respectfully,

Clay Tallman,
Commissioner.

Approved, July 15, 1915.
A.A. Jones
First Assistant Secretary
(emphasis added).

13. 44 L.D. 325 (1915):

EDITORIAL NOTE

In connection with the foregoing regulations as printed in pamplet form there were added, as an appendix, for information and convenient reference, reprints of the instructions of . . .44 L.D., 195, under the act of January 11, 1915, providing for the purchase and disposal of certain lands containing kaolin, kaloinite, fuller's earth, China clay, and ball clay, in Tripp County, *formerly* a part of the Rosebud Indian reservation, South Dakota (emphasis added).

14. Department of the Interior, Ann. Rep. of the Comm. of the General Land Office, 165 (1916):

Rosebud Indian Lands

Unentered land *within the former Rosebud Indian Reservation in Lyman and Tripp Counties*, South Dakota, were offered for sale to the highest bidders for cash at Gregory, South Dakota, on September 23, 1915. The prices received ranged from $2.50 to $7 per acre. In all 5,763.71 acres were sold for $17,866.07. *All* tracts were sold. The sale was made under authority of the act of March 2, 1907 (34 Stat. 1230), and departmental regulations approved July 28, 1915. . . .

Very respectfully,

Clay Laceman, Commissioner
(emphasis added).

15. 47 L.D. 177 (1919):

REGULATIONS FOR THE SALE OF CERTAIN LOTS IN MINNEOTA TOWNSITE IN THE *FORMER* ROSEBUD INDIAN RESERVATION, TRIPP COUNTY, SOUTH DAKOTA

INSTRUCTIONS
DEPARTMENT OF THE INTERIOR

Washington, D.C., May 24, 1919.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Under the provisions of the act of March 2, 1907 (34 Stat., 1230), you are directed to cause the lots designated from "A" to "S" inclusive in the townsite of Minneota within the *former* Rosebud Indian Reservation, Tripp County, South Dakota, to be offered for sale at public outcry under the supervision of the Superintendent of Opening and Sale of Indian Lands at not less than their appraised value on June 14, 1919. . . .

Alexander T. Vogelsang
First Assistant Secretary
(emphasis added).

16. Annual Rep. of the Board of Indian Commissioners to the Secretary of the Interior, Report on the Rosebud Indian Agency, South Dakota, Hugh L. Scott, 28 (1912):

. . .*there are several large towns on what used to be* the old reservation. The largest is Winner, [Tripp County] . . .(emphasis added).

2. 33 L.D. 124 (1904):

Instructions, Department of the Interior,
General Land Office, Washington, D.C.,
July 19, 1904.

Register and Receiver,

Chamberlain, South Dakota.

Sirs: All persons who apply to enter lands within the *former* Rosebud reservation, . . .

W.A. Richard, Commissioner.

Approved: Thom. Ryan
Acting Secretary
(emphasis added).

3. Department of the Interior, Indian Affairs Ann. Rep., Report of the Agent for Rosebud Agency, Chas. E. McChesney, Agent, 334 (1904):

Sir: I have the honor to submit the annual report of this agency for the year ending June 30, 1904):

The Rosebud Reserve embraces about 2,700,000 acres of land, situated entirely within the State of South Dakota, and *extends* from the Nebraska State line on the south to the White River on thenorth and from the Pine Ridge Reserve lines on the*west* to the range line between ranges *73* and *74* west, fifth principal meridian, on the east. All the land *formerly belonging to this reserve east* of the above range line is now open to settlement under an act of Congress passed at the last session thereof. The opened portion includes about 416,000 acres (not counting the Indian allotments) and is the major part of Gregory County, S. Dak. . .(emphasis added).

4. FOURTH ANNUAL REVIEW OF THE PROGRESS OF SOUTH DAKOTA FOR 1904 III STATE DEPT. OF HISTORY, SOUTH DAKOTA HISTORICAL COLLECTIONS 21 (1906):

The State Historical Society takes pride in presenting herewith its Fourth Annual Review of the *Progress* of the State, and congratulates South Dakota upon continued excellent conditions and another year of prosperity and happiness.

Two circumstances, each unique in itself, have made the year notable in this state. The first of these was the opening of a portion of the Rosebud Indian Reservation to settlement, and the remarkable rush of homeseekers who desired to secure locations upon these fertile lands. The section opened by act of congress comprised about 416,000 acres of Gregory County, *off of the east end of the reservation*. . .(emphasis added).

5. C.T. at 4-5 (Dec. 1906):

Inspector McLaughlin: . . .There is no railroad running over any portion of the Rosebud Reservation, none within the boundaries of your reservation. That railroad in Gregory County has not yet come across your reservation boundary, but should it come into your reservation, you would receive pay for its right of way. Any of the Indians who may live in Gregory whose allotments have been crossed by that railroad, have, or will receive pay for the privilege of crossing their allotments, so you need not worry about that, my friends.

6. YESTERDAY AND TODAY: A HISTORY OF THE CHICAGO AND NORTHWESTERN RAILWAY SYSTEM, at 133 (1910). The following quotation from the annual report for fiscal year *1906* appears therein:

The company had also undertaken the construction of an extension from Bonesteel, South Dakota to Gregory South Dakota, a distance of 25.93 miles, and would be complete during the ensuing fiscal year. This extension will *pass through Gregory County*, which embraces that portion of the Rosebud Indian Reservation opened to settlement in 1904, and will terminate near the *present* eastern boundary of that reservation (emphasis added).

7. 38 L.D. 214 (1909):

First Assistant Secretary Pierce to the Commissioner of the General Land Office, September 20, 1909. . . .

. . . The land embraced in said entry is a part of the *former* Rosebud Indian Reservation opened to entry and settlement August 8, 1904, by proclamation of May 13,1904 . . . .(emphasis added).

8. Department of the Interior, Secretary of the Interior, Ann. Rep. 34 (1917):

Public Sales have been announced to take place during the coming season. . .of unsold lands in the *former* Rosebud Reservation in Gregory County, South Dakota (emphasis added).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent,

United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent,

United States of America ex rel.
AMBROSE ST. JOHN, Respondent,

United States of America ex rel.
JAMES R. KEEBLE, Respondent

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CURTIS SHALL, Respondent,

United States of America ex rel.
ROMAN V. DERBY, Respondent,

United States of America ex rel.
JOSEPH DAY, Respondent

United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent

United States of America ex rel.
CLARENCE WALKER, Respondent,

United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.

(Nos. 73-1453 to 73-1459 and 73-1541 to 73-1543)
Eighth Circuit Court of Appeals

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"For reasons that will become evident we find it necessary to depart from the holding in DeMarrias."

DeMarrias Supra was not in conformity with the cases of the Supreme Court of the United States.

Seymour v. Superintendent, 368 U.S. 351 (1962)

Mattz v. Arnett, 93 S.Ct. 2245 (1973)

McClanahan v. State Tax Commission of Arizona, 93 S.Ct. 1257 (1973)

Nor was DeMarrias Supra in conformity with the other cases of the Circuit Court of Appeals or with our own District Court here in this state or the Supreme Court of the State of South Dakota.

United States ex rel. Condon v. Erickson, 478 F.2d 684 (1973)

Beardslee v. United States, 387 F.2d 280

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It was, therefore, necessary for our present Circuit Court of Appeals, in order to have uniformity of decisions, to reverse DeMarrias supra as they did, and also it was necessary for the Circuit Court of Appeals to reverse DeMarrias supra as they so ably stated to bring it in line with the direction of our United States Supreme Court as set out in the cases above.

The petitioner gives considerable weight to the idea that now more time and research has been presented after the Eighth Circuit Court of Appeals handed down its decision in the case in question, and from which they are trying to get this Writ of Certiorari, and they now admit that this material was not presented to the Circuit Court of Appeals.

It is the Respondents' position that all of the material was presented before the Circuit Court of Appeals, that a copy of the 1867 Treaty was made a part of the Respondents' Brief, and that the Circuit Court of Appeals referred to it in their opinion very specifically and they even went further with the other parts and stated:

> "Nothing that can be gleaned from the legislative history or subsequent legislative enactments can be fairly said to shed any further light upon the intent of the Congress regarding the reservation boundaries. The Committee reports on the 1891 Act and reports on similar bills that were not enacted do not discuss the proposed boundaries. The only direct reference to the boundaries of the reservation subsequent to the 1891 Act came from President Harrison in his proclamation opening the lands 'within the Lake Traverse Reservation' to settlement. (emphasis supplied)" 27 Stat. 1017

It is the Respondents' further position that new material cannot properly be presented before this Court on an appeal but must have been originally presented to the lower Courts.

> United States of America v. Ray Keith Atkinson, 297 U.S. 157, 80 L.Ed. 555
>
> Pennsylvania Railroad Company v. Illinois Brick Company, 297 U.S. 796, 80 L.ed. 796
>
> 5 Am.Jur. 2d, Page 32 #547:
>
> "The general rules that questions, to be

> available on appeal or review, must be raised and reserved in the lower court, and that the higher court can consider the case only on the theory of the parties in the lower court, apply on an appeal from the judgment of an intermediate appellate court."

The petitioner does not try and enlighten the rest of us as to what this further research has presented but they are asking us to buy a pig in a poke and we, therefore, do not get an opportunity in this brief to refute or properly answer any of this material that they think they have found, and it is our contention that all of this has been previously considered by the Circuit Court of Appeals.

CONCLUSION

The appellant is not alleging that the case in question is not in conformity with the other Circuit Court of Appeals cases, and in fact, the opposite is true that it is in conformity and it is not an appeal from a State Court decision at all, that the case that they relied on, DeMarrias supra, was by this Circuit Court of Appeals reversed and that any additional information that they have not presented to the prior Court would not properly come before this Court but that in reversing DeMarrias supra, upon which the Spider case supra relied, it brought this in conformity as was necessary with the other Circuit Courts and with the other decisions from this Circuit Court as well as in the District Courts within this Circuit.

Respectfully submitted

L. R. Gustafson
Britton, South Dakota
Attorney for Respondents

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1500

DON R. ERICKSON, Warden
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United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

KERMIT A. SANDE
Attorney General
State of South Dakota
Suite A 304
Capitol Annex
Pierre, South Dakota 57501

WALTER W. ANDRE
Assistant Attorney General
State Capitol Building
Pierre, South Dakota 57501

TOM D. TOBIN
422 Main Street
Winner, South Dakota 57580

Attorneys for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent.
United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent.
United States of America ex rel.
AMBROSE ST. JOHN, Respondent.
United States of America ex rel.
JAMES R. KEEBLE, Respondent.
United States of America ex rel.
CURTIS SMALL, Respondent.
United States of America ex rel.
ROMAN V. DERBY, Respondent.
United States of America ex rel.
JOSEPH DAY, Respondent.
United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent.
United States of America ex rel.
CLARENCE WALKER, Respondent.
United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The decisions and orders of the United States District Court of South Dakota, Northern Division, as yet unreported appear at Appendix B of the Petition for Writ of Certiorari. The opinion of the Eighth Circuit Court of Appeals is reported at 489 F.2d 99 and is reproduced at Appendix A to the Petition for a Writ of Certiorari.

JURISDICTION

The judgment and opinion of the Court of Appeals was filed December 7, 1973. A timely petition for rehearing, and rehearing en banc was denied on January 8, 1974. The petition for a writ of certiorari was filed April 8, 1974, and was granted June 3, 1974. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Articles 3 and 10 of the Treaty of February 19, 1867, 15 Stat. 505, sections 26-30 of the Act of March 3, 1891, 26 Stat. 989, 1035, and 18 U.S.C. are set forth at Appendix C to the Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether the Act of March 3, 1891, amending and ratifying an 1889 agreement for the outright cession and sale of all the unallotted lands of the Lake Traverse Reservation to the United States Government for a sum certain, disestablished said reservation and restored said lands to the public domain.

STATEMENT OF THE CASE

These consolidated cases are the result of habeus corpus petitions initiated in the United States District Court of South Dakota, Northern Division, in which the petitioners below claimed that the State of South Dakota did not have jurisdiction to try, convict and sentence them to the South Dakota State Penitentiary because their criminal acts took place within the boundaries of the Lake Traverse Reservation. Accordingly, they requested that their sentences be vacated and they be released. The district court denied the writs of habeus corpus and the petitioners below appealed.

On December 7, 1973, the Eighth Circuit Court of Appeals reversed and remanded for proceedings consistent with its opinion.

SUMMARY OF ARGUMENT

The Lake Traverse Reservation was disestablished by

Congress in 1891 by the ratification of an 1889 agreement whereby the members of the Sisseton-Wahpeton Tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to" all the unallotted land of their reservation for a sum certain. This act, on its face and especially in light of the legislative history and surrounding circumstances, clearly restored the lands so ceded to the public domain. Members of Congress and the Commissioner of Indian Affairs at the time repeatedly and specifically attributed this affect to the ratification of the agreement.

Although the 1889 cession agreement was tailored to the Dawes Act of 1887, an examination of the documents of the period in their proper historical perspective conclusively establishes that Congress did not intend to alter the established "public domain" precept of the cession era.

ARGUMENT

I

ON ITS FACE AND IN LIGHT OF THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES, THE ACT OF MARCH 3, 1891, CONCLUSIVELY ESTABLISHES THAT CONGRESS INTENDED TO DISESTABLISH THE LAKE TRAVERSE RESERVATION BY RESTORING ALL THE UNALLOTTED LAND THEREIN TO THE PUBLIC DOMAIN.

> If the policy of allotting lands is conceded to be wise, then it should be applied at an early date to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the public domain, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were

> designed, have shown themselves a hindrance to the progress of the Indians as well as an obstruction in the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away. Report of the Commissioner of Indian Affairs, 8 (1891).

A. CONGRESS DID NOT ALTER THE FUNDAMENTAL PRECEPT OF CESSION AGREEMENTS BY SIMPLY TAILORING THE AGREEMENTS TO THE DAWES ACT OF 1887.

In 1867 the members of the Sisseton and Wahpeton bands of Sioux Indians were given a large triangular area of land known as the Lake Traverse Reservation, situated in what is now the northeastern part of South Dakota. In early 1889 certain members of the tribe were approached and indicated they would sell their reservation:"..[w]e never thought to keep this reservation for our lifetime. . . .We don't expect to keep reservation. We want to get the benefit of the sale. . . ." *The Minneapolis Tribune*, May 22, 1889 at 1 (Appendix I, 19).

Soon thereafter, a Commission, sent to negotiate the purchase concluded an agreement whereby the members of the Sisseton–Wahpeton bands of Sioux Indians agreed to:

> . . .cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said band of Indians as aforesaid. . . .Act of March 3, 1891, 26 Stat. 1032.

In his Annual Report to the Secretary of Interior for 1890, the Commissioner of Indian Affairs stated that the agreement would "restore to the public domain. . .about six hundred and sixty thousand acres in South Dakota, in the Lake Traverse

(Sisseton) Reservation" upon ratification. Report of the Commissioner of Indian Affairs, XXXVIII (1890). The Secretary of Interior's Annual Report was identical in this respect. H.R. Exec. Doc., 51st Cong., 2d Sess. (1890).

On the floor of the Senate, a moment before ratification, Senator Dawes stated clearly and concisely:

> The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the surrender of a large portion of their reservations to the public domain. In the main it has cost the United States between $1.25 and $1.50 per acre for some ten or eleven million acres of land. All this land is opened by this bill to settlement as a part of the public domain. . . .22 Cong. Rec. 3879 (1891).

The agreement was ratified on March 3, 1891, and the sum of one million, six hundred ninety nine thousand, eight hundred dollars was placed by the United States Government in the treasury of the United States to the credit of said Sisseton-Wahpeton Band of Sioux Indians "to pay" for the "lands by said agreement ceded, sold, relinquished and conveyed. . . ." Act of March 3, 1891, 26 Stat. 1039.

In his Annual Report to the Secretary of Interior for 1891, the Commissioner of Indian Affairs stated ". . .The ratification of agreements by the act of March 3, 1891 (26 Stats., 989), restored to the public domain. . .from the Lake Traverse Reservation, South Dakota, about 660,000 acres,. . ." Report of the Commissioner of Indian Affairs, 44 (1891). The Secretary of Interior's Annual Report was identical in this respect. H.R. Exec. Doc. No. 66, 52 Cong., 1st Sess. (1891).

The reservation was "thrown open" in 1892 and the large orange triangle representing the Lake Traverse Reservation was

immediately and unequivocally removed from the official map of the Office of Indian Affairs compiled under the direction of the Commissioner of Indian Affairs, showing Indian reservations within the limits of the United States. Report of the Commissioner of Indian Affairs, Appendix (1892). The figures in the "area in acres" and "square miles" sections of the "Schedule showing the names of Indian reservations in the United States Agencies, tribes occupying or belonging to the reservation, etc." were also similarly deleted. Report of the Commissioner of Indian Affairs, 908 (1892).

From this date on, the "former Lake Traverse" terminology begins to appear in the official communications of the Office of Indian Affairs and the Department of the Interior, a designation found in hundreds of other miscellaneous sources as well. In any one year, this or some designation of similar import appears in communications of those concerned with what "was" the Lake Traverse Reservation, a sampling of which reads:

1. "[F]ormer Sisseton and Wahpeton Reservation"–Assistant Commissioner of the General Land Office (1897). Letter, Appendix I.1.

2. "[U]pon the former Sisseton–Wahpeton Reservation"–Member of the Sisseton–Wahpeton Bands of Sioux Indians (1901). Letter, Appendix I, 2.

3. "[W]ithin the former Lake Traverse Indian reservation"–Affidavit of United States Special Agent (1902). Letter, Appendix I,3.

4. "[C]ertain described land in the former Sisseton Reservation" – Commissioner of Indian Affairs (1902). Letter, Appendix I, 6.

5. "[I]n what was formerly the Sisseton Indian Reservation"–Chairman of House Committee on Indian Affairs (1906). Letter, Appendix I, 9.

6. "[I]n former Sisseton and Wahpeton Reservation"–Commissioner of Indian Affairs (1912). Letter, Appendix I, 10.

7. "[I]n former Sisseton and Wahpeton Reservation"–Acting Chief of Land Division, General Land Office (1913). Letter, Appendix I, 11.

8. "[W]within the former Lake Traverse Reservation" – Assistant Commissioner of Indian Affairs (1918). Letter, Appendix I, 12.

9. "[I]n the former Sisseton Indian Reservation"–Commissioner of Indian Affairs (1918). Letter, Appendix I, 14.

Your Petitioner cannot and will not argue that this disestablishment and restoration to the public domain of the Lake Traverse Reservation was intended by Congress to be an exception to the prevailing legislation of the period because the documents of the period simply do not support that conclusion. Indeed, if one were to page through almost any Annual Report of the Commissioner of Indian Affairs from 1887 until 1915 a contrary preconception would instantly vanish. The gist of the quotation of the Commissioner of Indian Affairs in 1891 set forth, *supra,* could be similarly documented in 1890 under the heading of "REDUCTION OF RESERVATIONS" or in 1892 under the heading of "COMMISSIONS AND NEGOTIATIONS FOR REDUCTION OF RESERVATIONS." Report of the Commissioner of Indian Affairs, XXXVII (1891), Report of the Commissioner of Indian Affairs, 74 (1892), respectively. An examination of the Maps of Indian Reservations published each

year therewith graphically illustrates this precise point.[1]

Therefore, as a preface to the detailed examination of the legislative history of the Act of March 3, 1891, the argument of Petitioner will be in the form of a brief reconstruction of the position Petitioner thinks that Congress assumed in relation to Indian land cessions during the period from 1860 until 1900. To what extent the conclusions drawn from this reconstruction are in conflict with the holding of *Seymour v. Superintendent*, 368 U.S. 351 (1962), and *Mattz v. Arnett*, 412 U.S. 481 (1973), and the line of recent cases adhering to the rationale therein, is, of course, for this Court to resolve in whatever manner it deems appropriate.

Before 1887 it was the fundamental precept and purpose of the Indian land cession policy that the ratification of a cession agreement would extinguish the Indians' claim or title to a given described area. If the ceded area, or area to be so extinguished, included only a portion of the reservation, the boundaries would necessarily be diminished so as to encompass the reduced area or reservation remaining, and the members of the tribe would be required to remove thereto. If the whole reservation was to be ceded or extinguished, the boundaries were nevertheless just as necessarily extinguished, with the tribes involved usually being required to remove to another reservation. In both instances the area so ceded would be restored to the public domain and later "opened" to homesteading.

Petitioner has been unable to substantiate that Congress intended to alter this fundamental aspect of Indian land

1. A complete set of these maps will be presented to this Court in seperate appendix.

cessions by enacting the Dawes Act of 1887. Indeed, an examination of the documents of the period presented herein would seem to compel the opposite conclusion.

Admittedly, the 1887 Act effected several changes with respect to the established cession policy. However, none of these were in any way intended to affect, nor did they affect the necessary diminution the cession or sale would have had on the boundaries of that particular reservation. In fact, by utilizing Section 5 of the Dawes Act and tailoring cession agreements to conform thereto, Congress could and did effectively reduce the size of Indian reservations at a much more rapid pace than had theretofore been possible. As succinctly stated by the Commissioner of Indian Affairs:

> If the policy of allotting lands is conceded to be wise, then it should be applied at an early day to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the public domain, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indian as well as an obstruction in the pathway of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away. Report of the Commissioner of Indian Affairs, 8 (1891).

For purposes of illustration, assume that a certain cession or sale for the entire north half of a reservation was proposed in 1889, but only a small percentage of the members of the tribe had as of that date received an allotment. If this proposal nevertheless met with the approval of the Commissioner of Indian Affairs, he would write the Secretary of the Interior and

therein cite §5 of the Dawes Act which provides:

> *And provided further*, That at any time after lands have been allotted to all the Indians or any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress. . .Act of February 8, 1887, 24 Stat. 389-390.

Paraphrased for the purpose of our hypothetical example, this section would allow the Secretary to negotiate for the release of "such portions" of the reservation not allotted if the tribe would consent, irrespective of the fact that only a small percentage of allotments had yet been made and these were scattered throughout the entire reservation.

If the Secretary concurred, he would appoint several commissioners and ask that the Commissioner of Indian Affairs submit a "draught of instructions" for his approval. After approval, the instructions would be forwarded to the Commissioner. In most instances the information contained therein was of a very general nature, such as the year the reservation was created and the number of signatures required for the necessary "consent."

The Commission would proceed to the reservation, negotiate the cession and draw up an agreement for the

approval of the tribe containing the price per acre and certain other specifics, such as the total amount of money the United States was to pay for the area ceded, which would be held in trust for the benefit of the tribe, again pursuant to §5 of the Dawes Act. The entire agreement would not be effective until ratified by Congress, again pursuant to §5 of the Dawes Act. Then the agreement would be amended in Congress to provide that the land so sold or released by the tribe to the United States was required to be held by the United States for the sole purpose of securing homes to actual settlers if it was adaptable to agricultural purposes, again pursuant to §5 of the Dawes Act.

In our hypothetical the agreement would of necessity have to describe and separate the north half or area ceded by some boundary marker or other survey from that portion of the reservation unaffected by the cession, the south half. In all agreements of this type this was in fact the case. One part of the reservation had been ceded and would thereby soon be restored to the public domain and be opened to homesteading upon amendment and ratification by Congress and proclamation by the President. The other part would remain intact and be referred to as the diminished reservation, or the remaining reserve, or just the reservation.

As for those individuals whose allotments were now soon to be situated in a newly created public domain, they were usually given the election to remain so situated or to relinquish their allotment and remove to the diminished reservation and/or the reservation and reselect therein. At a later date this whole process was sometimes repeated again on the same reservation and thus the original reservation would be eventually reduced to one-fourth of its original size with the ceded area restored to the public domain and opened to actual homesteaders.

Of course in our hypothetical there would be no question as to the effect of the agreements, as ratified, on the boundaries of the original reservation. With each opening there would, of necessity, be a proper delineation of the area opened from the area remaining or the diminished reservation. In some cases the "public domain" terminology would appear in the text of the Act and in others it would not. In some cases the "diminished reservation" terminology would be repeatedly referred to in the text of the Act and in others it would not. [2]

In any event, boundary questions over agreements of this type from this era have not been difficult for the courts to dispose of precisely because of the fact that only a portion of the reservations were open and there necessarily exists enough documentation related to the remaining or diminished reservation to resolve the issue.

However, the precise effect Congress intended acts similar in all respects to the above example to have, when the agreement provided for a cession of all of the unallotted land of the reservation, is a much more difficult determination and is *precisely* the situation presented in the instant case.

The difficulty arises in part because of the fact that if Petitioner's reconstruction is correct, [3] there would be no new or diminished reservation and therefore no new or diminished reservation boundaries for the agreement for Congress to be concerned with. Nevertheless, after the opening, the allotments would still be situated on the public domain surrounded by settlers in precisely the same fashion as those areas affected by

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2. See discussion, *infra*, at 54-57.

3. This reconstruction is documented, *infra*, at 52-74.

the partial openings discussed *supra*, and the reservation would have been just as effectively disestablished. [4] In addition thereto, in the instant case, the difficulty is compounded by the mountain of Indian-related legislation that was pending before Congress at the time the Sisseton-Wahpeton agreement was being considered. Consequently, there is very little legislative history even directly concerned with the Act which this Court must construe and half or what is available is concerned with a "loyal scout claim" the Sisseton-Wahpetons had insisted be included with a consideration of the cession agreement.

Thus the importance of construing the Act in a proper historical perspective, *however improper that perspective might now appear*, becomes even more a necessity in order to avoid what Petitioner believes, in light of *Mattz*, *supra*, and *Seymour*, *supra*, might lead to a misconstruction of the crux of three decades of legislation. To this end, and for this purpose, your Petitioner will present (1) the detailed series of quotations from the surrounding circumstances and legislative history of the Sisseton–Wahpeton Act, (2) a comparison of the Sisseton–Wahpeton Agreement, in essence a cession agreement tailored to the Dawes Act, with another pure cession agreement, ratified and passed by the same Congress, the same day, in the same Act as the Sisseton-Wahpeton Agreement. All of which Petitioner thinks will clearly establish that Congress did not intend any modification necessary under the Dawes Act to alter the fundamental precepts of the cession era– precepts which necessarily diminished or extinguished all reservations.

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4. Congress was also using this same basic cession format to extinguish reservations via cession agreements concluded with different tribes, each claiming some kind of title in the same areas whether it was within or without the boundaries of the existing reservation they were residing upon.

B. THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES OF THE RATIFICATION OF THE 1889 SUM CERTAIN CESSION AGREEMENT WITH THE SISSETON-WAHPETON TRIBE CONCLUSIVELY ESTABLISH THAT CONGRESS INTENDED TO DISESTABLISH THE LAKE TRAVERSE RESERVATION BY RESTORING ALL OF THE UNALLOTTED LAND THEREIN TO THE PUBLIC DOMAIN.

The history of the Sisseton–Wahpeton negotiations follows the same general pattern found in the histories of similar agreements. After a period of time the areas bordering reservations would become populous and in need of additional land. Shortly thereafter, citizens of these communities would begin to lobby for the opening of a portion of the nearby reservation by sending communications to the Commissioner of Indian Affairs and their congressional delegation to the effect that the reservation was a barrier to the general welfare of the country, and blocked the extension and construction of much needed railroads.[5] They would argue that the Indians did not need the reservation, that they were already being allotted and that a large area should therefore be restored to the public domain and opened to homesteading. In general, the citizens were eventually successful.

In the case of the Lake Traverse Reservation, a banker from Milbank, South Dakota, set the process in motion by written communication of April 22, 1889, to the Secretary of Interior stating that the Lake Traverse Reservation was a "great detriment" to the area's "interests" and that it blocked the "progress of two or three lines of railroad" that they needed badly. Letter, Appendix I, 15. Additionally, Mr. Diggs informed

5. The construction of a railroad through a reservation involved a great deal of bureaucratic inertia.

the Secretary that the "opening of the reservation would give new impetus to immigration which has been attracted by government lands further west." Letter, Appendix I, 15.[6]

On May 1, 1889, Mr. Diggs assembled a convention of eight counties in Watertown, South Dakota, to "take Action Relative to the Opening of the Sisseton Indian Reservation." Resolution, Appendix I, 16. A resolution was prepared to the effect that the delegation would support the Indian "loyal scout claim" since this was necessary to obtain the consent of the Indians to opening the reservations to settlement–a reservation that was stated to be "lying in the midst of a well settled section of country. . .a barrier to the completion of railroads in course of construction or progress, and to the general welfare of the country," and "not now necessary to the interests of the Indians" since they had taken their allotments of lands. Resolution, Appendix I, 16.

The entire resolution was forwarded to the Acting Commissioner of Indian Affairs on May 4, 1889. Mr. Diggs then arranged a council with the leaders of the Sisseton–Wahpeton band, Chief Gabriel Renville and nine of his headmen. Again, members of the tribe expressed the view that if Mr. Diggs and his friends would help them clear up the "loyal scout claim" they would consent to the cession. In their words:

> We never thought to keep this reservation for our lifetime. . .
>
> Now that South Dakota has come in as a state we have some one to go to, to right our wrongs. The

6. Mr. Diggs was referring to the recent "opening" of the Great Sioux Reservation in South Dakota, which disestablished and restored to the public domain approximately 11,000,000 acres of land previously within the boundaries of the Great Sioux Reservation.

> Indians have taken their land in severalty. They are waiting for patents. The Indians are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation. We want to get the benefit of the sale. If the government will pay what they owe, we will be pleased with the opening. There will be left over allotments 880,000 acres. If the government pays what they owe, and pay what they agree per acre, we will be pleased with the opening. When the government asks me to do anything, I am always willing to do it. I hope you will try to get the government to do what is right.
>
> If the government will do this, it will benefit both the Indians and the whites [and illustrates by holding up a half a dozen keys in a perpendicular position, separately,], we all stand this way [and then, pressing them against each other,], we will be as one key. When the reservation is open we meet as one body. We be as one. . . .
>
> If we get the money we will open up. Your committee needn't be discouraged, we will open up. . .
>
> We are anxious to become citizens and vote. We have laid before you all we have to say from our hearts. . . .The Minneapolis Tribune, May 22, 1889 at 1 (Appendix I, 19).

After the council, Mr. Diggs continued to bombard the Commissioner of Indian Affairs with questions of what could be done to facilitate an early opening. Letter, Appendix I, 21. On June 21, 1889, the Commissioner responded by forwarding the above mentioned resolution to the Secretary of the Interior with a cover letter wherein the Commissioner quoted the applicable section of the Dawes Act that made it lawful for the Secretary to negotiate with an Indian tribe:

> [F]or the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribes shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of the Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress. . .

and noted that the 1867 Treaty creating the reservation contained "no provisions applicable to such negotiations." Letter, Appendix I, 23.

He further stated that he thought it would "be for the best interests of the Indian to throw open to settlement a large portion of their surplus lands," and cautioned the Secretary that:

> Such negotiations can proceed no further than securing the consent of the Indians to the sale of such portion of the reservation as may be agreed upon, and determining the considerations for which they are willing to make the cession, these negotiations to be submitted for the approval of Congress, which alone can prescribe the form and manner of executing the necessary release. Letter, Appendix I, 24.

On August 13, 1889, a set of instructions "for the guidance of a Commission. . .to negotiate with the Sisseton and Wahpeton Indians for the sale of their surplus lands" were forwarded by T.J. Morgan, Commissioner of Indian Affairs to the Secretary of the Interior for his approval. Letter, Appendix I, 25. The purpose, as per instructions, was for "negotiating with the Sisseton and Wahpeton Indians for the relinquishment of such portions of the Lake Traverse Reservation, not allotted, as said Indians may consent to release." Letter, Appendix I, 26.

Noting that the Treaty made "no provisions regarding the cession or relinquishment of the reservation or any portion thereof" the Commissioner stated:

> You will call a full council of the bands and submit the subject for their consideration. If a majority of such council determined to sell any portion of the reservation, you will then agree upon the quantity of land to be sold, and its location. . . .
>
> The terms and conditions agreed upon in Council, with the description of the lands to be relinquished, should be reduced to writing and incorporated in the accompanying form of agreement. . . .Letter, Appendix I, 27.[7]

By November 12, 1889, three gentlemen were finally chosen to represent the government in the upcoming negotiations: Charles A. Maxwell, Esq., Chief of the Land Division of the Department of the Interior, Hon. E. Whittlesey, Secretary of the Board of Indian Commissioners, and the aforementioned Hon. D.W. Diggs. Letter, Appendix I, 29.[8]

On November 29, 1889, the Commission arrived at the Sisseton agency on the Lake Traverse Reservation. A Council was convened and the sessions continued over the next two weeks.

Initially General Whittlesey explained the purpose of their visit:

> General Whittlesey: We greet you all as friends. We know that you are our friends and we are your friends. We do not forget the friendship shown by you in 1862. We know how you have worked since you have been on this reservation for yourselves and for your children. Now you have selected your lands and have patents from the Government You own those lands and they can not be taken from you. More than that, you now stand in a new position as citizens of the United States and of South Dakota. You are under the same laws that other people have to obey and are protected by the same laws that protect other people. Coming to this position you need something to make this new start in life. You have a *tract of land* which is unoccupied and of no use to you, and you have been reported in Washington as wishing to dispose of some of those lands; they are yours and no one wishes to take them from you. There is this difference between you and other land-owners, you can *sell* only to the Government of the United States. This being the situation the Secretary of the Interior has sent us here to consult with you about your land. In order that you may know that what I have said is true, I will read to you the instructions from the Secretary. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 16 (1890), containing Council Transcripts (hereinafter cited as C.T. at) (emphasis added).

However, as far as Gabriel Renville was concerned there were other issues that continued to be conditions precedent to any discussions of a sale of the reservation:

> Gabriel Renville: They feel that they are not ready to speak of the surplus lands at present. At a meeting at Big Cooley last summer we told our friends Mr. Diggs and General Pease that there were some things in the way of our *selling* the surplus lands. There were three things in the way.The first is that the Government owes us. We have tried to get it, but can not. The second is that an error was made in the survey of this reservation, and we claim a

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7. At this point the Commissioner did not contemplate a cession of all the surplus lands. Rather, the description referred to would have probably been either a metes and bounds, or a geographical description, separating the area ceded from the remaining or diminished reservation.

8. Other gentlemen were considered and rejected as evidenced by the series of correspondence from September through November of 1889. Therein the negotiations were variously referred to as encompassing "sale of their surplus land in their reservation. . .sale of a portion of the surplus land of their reservation. . .sale of their surplus lands. . .sale of their unallotted lands. . .negotiations as to their surplus lands. . .sale of the surplus lands in the Lake Traverse Reservation."

> piece which we ask be counted in with the surplus lands. We have received our patents since the meeting at Big Cooley, which was at that time the third thing. My friend Diggs went with me to Washington to consult the authorities in regard to these matters. I presented my claim to the Secretary. The Secretary told me that that office would do all in its power to have our claim allowed. The feeling among the people is not that they do not intend to *sell* at all, but what we want is that our claim be allowed first. After that, if a commission comes we will sell to them if we can agree on terms. . . .In 1872 a commission came here, to treat for the lands lying between here and Devil's Lake. The commission called it 8,000,000, but it contained when surveyed 17,000,000 acres. We do not claim anything on this, but think that the little mistake in survey ought to be corrected. We simply want the amount of land included in the surplus land when sold. C.T. at 17.

General Whittlesey responded with a compromise which was eventually agreed upon:

> General Whittlesey: If we should have the back claim and the opening of the reservation all in one agreement one would help the other. Now we should be glad to hear from you about one thing. If you should be willing to sell this land how much would you ask per acre? I mean if the claim and the *sale of land* was on one agreement. C.T. at 18. (emphasis added).

The only other exchanges of any significance that were concerned with the specifics of the question in issue were:

> Mr. Diggs: The adjacent counties want this reservation opened, and also we were interested in your welfare. It would not only help you but it would help them. Now you see we were interested in having the reservation opened while you were

interested in having your claim paid. Your interests and ours have come together.

The people who wanted the reservation opened appointed a committee, Mr. Crossfield, General Pease, and myself, to go to Washington to attend to both of these matters. Chief Renville, Mr. Crawford, and this committee went to Washington and talked the matter over. The officers understand that you want the reservation opened and have sent these gentlemen here. They know all about your affairs.

Our proposition is this: After setting aside lands for schools, churches, and any who may not have received allotments, to buy the balance. When we have agreed on a price per acre, we recommend that the back annuities be paid first, from 1862 to date; second, that the surplus lands be paid for at a price agreed upon; these are the two points. We have several members of Congress from the Dakotas. These men are all in sympathy with and will work together to get the bill through. I have in my pocket a letter from one of the Senators saying, "I hope you will make a good treaty with those Indians; I will help get it through." . . .The opening of this reservation can carry your claim through, because by passing your bill they please you and get your votes, and by opening the reservation please the whites.

Gabriel Renville: We are friends; first settle our claim and then we will listen and talk with you about our surplus land.

I have spoken for all of the people, and it is their wish that I should say these things. *In the past there has been lots of land sold, but we have not benefited by the sales.* In 1867 they promised us they would help us, but they have not helped us very much for many years. Let them first settle our claim and then we will talk about our surplus lands. We are now citizens and can talk with you as such, and do not care to talk about shoe pacs, etc., but cash. *We can buy for ourselves what we need if payment is made in cash, and then we do not care to have the agency*

here after the surplus lands have been sold. The people have asked me to say this as their wish.

General Whittlesey: We were sent here to ask you *what land you wish to sell* and to make such arrangements and conditions as we agree upon . . . .We have written out here all about the sale of the surplus lands and the payment of this money. It is a long paper and would take me a long time to read it. (Here a synopsis of the agreement or proposition was read.)

Michael Renville: We have only said that when the *sale of surplus lands* is considered we would ask that one hundred sixty acres be given to each member of the tribe. You spoke of money due us, some of us think it ought to come to all who belong here, while others think that none but scouts should receive it. We said in council that we would not sell surplus lands until back annuities were paid, but you say that if the lands are now sold the back annuities would be paid at the same time. This pleases us. We want a transcript of the agreement so that we can take it and consider it.

General Whittlesey: About the land matter. We have been told that some of you have been dissatisfied because some of you get only 40 and 80 acres of land so we have put in this agreement an equal division of land so that each will receive 160 acres. That will include the children born since the allotments of land. These were the two conditions made by you in regard to the sale of the surplus land. Third point. After you have received your back annuities, each receives 160 acres of land; *you will sell all that is left. . .Do you wish to sell your lands? How much land do you wish to sell* and how much will you ask per acre for the lands you wish to sell? *We have heard you wish to sell all after allotments have been made.*

Mr. Diggs: That this reservation was given you in

place of all back annuities according to the Third Article of the Treaty. After I have read that article I want to explain how we hope to overcome that. (Here third article of treaty approved February 19, 1867, was read). Now, I tell you what a lawyer would say; he would say that you were not entitled to back annuities because you received this land for it. You would say that it was yours already; then the lawyer would say that if one was void all was void and you have no land. How are we to overcome that? Our Congressmen are your lawyers and we shall put in their mouths this argument: "These people have been wrongfully kept out of this annuity and it is *but justice to them that you should admit it and that they be permitted to sell it* [i.e., the reservation] for their benefit as in part for injustice done them." Now, for the benefit you will receive in addition to annuities.

This reservation will be quickly settled by whites, bringing the arts of civilization, establishing schools in every township, so that you can send your children to school without sending them miles away, and I have no doubt you will have entire control of all money coming to you, there being no use for Government schools. Another advantage is, that the whites will exchange work with you. This will enable you to cultivate 50 acres where you now cultivate 10.

There are other advantages which I have not mentioned. One is you will have towns and railroads and good markets near you. All this will make your lands more valuable.

Chief Renville: *It took two summers on the Big Sioux Reservation [referring to the negioations that preceeded the 1889 Act that disestablished approximately one half of the Great Sioux Reservation] and at White Earth Agency. We do not care to do this in a hurry. We first decided not to sell* until after scout bill was paid, but we reconsidered yesterday and have made up our minds to do something, but you would not hear us – –

. . .We know these extracts of laws. We know that a change was made in the *taking of land out West*, and also on the 3 per cent interest. If they can change the law in regard to the taking of land they can do so in regard to the 3 per cent. *We have decided to sell all of the surplus after each has received 160 acres.* We know that the money due us on the treaty of 1851 is ours, and it has pleased us to have that in. In regard to the people out West selling for $1.25 per acre, we know that one acre of our land is worth ten of theirs [Great Sioux, *supra*]. In 1872 a commission came here and took all we had outside of this reservation for 5 cents per acre, and in *1851 the very best of our lands were sold* at less than 1 cent per acre. *This little reservation is ours, and all we have left. There is nothing in our treaty that says that we must sell. It was given us as a permanent home, but now we have decided to sell* for $5 an acre. . . .I do not blame you for not doing all we ask. You are only following instructions of superior officers. Mr. Diggs, are we citizens of the United States?

Mr. Diggs answered: The laws of South Dakota regards you as such, but you are regarded as Indians by the Government as long as you are dependent on it.

Mr. Maxwell said: The fact of an Indian becoming a citizen of the United States does not make him other than an Indian. It does not change his blood or race. Citizenship is a political privilege, while the race of the man shows what he is. Michael Renville asks if they can vote?

Answer (by Commission) Yes.

Mr. Diggs said: You cease to be Indians when the reservation is open and you are drawing interest on money as citizens.

General Whittlesey: I will not weary you with a long talk this morning. When we closed yesterday there was one thing that seemed to be in the way; that was the interest on the amount to be paid for the land and how it should be paid.

Gabriel Renville: There has never been money paid to Indians in a lump in payment for lands. The Government always owes for the land and pays the interest on the amount the same as when one of you borrow money from another.

General Whittlesey: I do not want any mistake to go out. I want you to understand this agreement. It says that the interest is 3 per cent. In this letter we say that it ought to be 5 per cent, and we ask the honorable Secretary to ask Congress to say it will be 5 per cent. We have also promised to do all we can to make it 5 per cent, and I think you will have the help of the Representatives from Dakota. Now I believe that all understand this. We have talked a long time. If we should stay to hear more my hair could not get much whiter, but I would become to old to act. This is just as we explained it yesterday. We give you an opportunity to sign, but if all of you decide not to sign you have that right, but if you sign you put a great deal of work on us.

Gabriel Renville: Why is it that it takes three-fourths at other agencies to rule while with us you say it takes only a majority. Our treaty does not provide for the *sale of this land* at any time.

General Whittlesey: My friend Gabriel knows that among white people a majority rules.

Simonds: This paper is presented for signatures and I have said that I will sign. I am playing no game. I am doing what is right. I have already said that I will sign and will do so now. C.T. at 19-20, 21,22,24,25, 26,27,28-29 (emphasis added).

It took an additional three days for the Commission to obtain the required majority of adult male signatures and on December 27, 1889, the signed agreement and their report thereon was forwarded to the Commissioner of Indian Affairs.

This report is essentially a condensation of events which occurred during the Council containing the same "selling of their reservation" terminology and is reproduced at Appendix I,

On January 28, 1890, the Commissioner of Indian Affairs forwarded the above document and his report to the Secretary of the Interior stating in part that:

> It appears from the report and accompanying papers that an agreement was reached with said Indians, which is in substance as follows, to wit.
>
> By Article I, the Indians cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation remaining after the allotments and additional allotments provided for in Article IV shall have been made.
>
> Article II provides that the United States will pay to the Indians $2.50 per acre for the land ceded.
>
> Article III provides for the payment of back annuities, and continues the annuities of $18,400 until July 1, 1901.
>
> Article IV provides for the equalization of allotments so that each person, including married women, shall have 160 acres. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 3 (1890).

In all, the Commissioner noted that there would be approximately 662,780 acres to which the Indian title is extinguished by the terms of the agreement" calling for an appropriation "for the ceded lands, . . .662,780 acres at $2.50 per acre, $1,656,950.00. S. Exec Doc. No. 66, 51st Cong., 1st Sess. 5 (1890).

On February 8, 1890, the Secretary of the Interior, John W. Noble, forwarded all of the above documents and his report to President Benjamin Harrison. Secretary Noble reiterated that:

> By the agreement the said Indians cede, sell, relinquish, and convey to the United States all their right, title, and interest in and to the unallotted lands within the Lake Traverse Reservation in North and South Dakota, remaining after certain additional allotments provided for shall have been made, at the uniform price of *two dollars and fifty cents per acre.*
>
> Allotments were made in 1887 upon this reservation to all who applied for and were found entitled thereto, in quantities as provided in the act of Congress approved February 8, 1887 (24 Stats., 388), under the fifth section of which the negotiations resulting in the agreement now presented were conducted.
>
> The Indians, however, were dissatisfied with said quantities (160 acres to each head of a family, 80 acres to each single person over eighteen years of age and to each orphan under that age, and 40 acres to each other single person under eighteen years of age), and insisted as a condition of the sale of their surplus lands that there should be allotted to each individual member of the band, without regard to age or condition, a sufficient quantity, in addition to the amount heretofore allotted, to make 160 acres. The fourth article of the Agreement accordingly provides for such additional allotments. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 2 (1890).

President Harrison's report and all of the above documents were then presented to Congress on February 18, 1890. In the President's message it was noted that:

> Perhaps the question of the payment by the United States of the annuities which were forfeited by the Act of February 16, 1863 (12 Stats., 652), should not have been considered in connection with this negotiation for the cession of these lands. But it appears that a refusal to consider this claim would have terminated the negotiation, and if the claim is just this allowance has already been too long

delayed. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 1 (1890).

The very next day the Vice President presented the President's message and accompanying papers to the Senate. 21 Cong. Rec. 1470 (1890). Senator Dawes then immediately moved that they be referred to the Committee on Indian Affairs and printed. 21 Cong. Rec. 1470 (1890). The same proedure was followed in the House on February 20, 1890, and, in addition, the entire text of the agreement was published in the *Congressional Record* at the request of Mr. Gifford from South Dakota. 21 Cong. Rec. 1549 (1890).

On February 21, 1890, Mr. Gifford introduced Bill H.R. 7309 to ratify and confirm the agreement which was referred to the Committee on Indian Affairs but never reported back. 21 Cong. Rec. 1638 (1890).

The agreement next surfaces in the Senate on March 21, 1890, with a Mr. Moody introducing Bill S. 3216 to ratify and confirm on behalf of Mr. Pettigrew from South Dakota who prepared the Bill but could not be present to introduce it . 21 Cong. Rec. 2455 (1890). It was then referred to the Committee on Indian Affairs and on April 11, 1890, Mr. Pettigrew submitted S. Rep. 661 to the House. 21 Cong. Rec. 3278 (1890). Only four paragraphs of the six page report were concerned with the cession agreement: [9]

> The Committee on Indian Affairs, to whom was referred Senate bill No. 3216, to ratify and confirm an agreement with the Sisseton and Wahpeton bands of Dakotas or Sioux Indians, and for other

9. The remainder of the report dealt with the "loyal scout claims." S. Exec. Doc. No. 66, 51 Cong., 1st Sess. (1890).

> purposes, have considered the same, and respectfully submit the following report:
>
> The negotiations of said agreement was made under authority conferred upon the Secretary of the Interior by the fifth section of the act of Congress approved February 8, 1887 (24 Stats., 388).
>
> By the terms of this agreement the said bands of Indians agreed to cede, sell, relinquish, and convey to the United States the unallotted lands within the Lake Traverse Reservation on the following conditions, to wit: That certain annuities claimed by them to have been unjustly withheld or forfeited under the act of February 16, 1863 (12 Stats., 652), be restored and paid; that an equalization of allotments be made, so as to give each Indian, without regard to age, sex, or condition, 160 acres; that the purchase price of the residue of their lands be fixed at two dollars and fifty cents per acre, and the proceeds thereof be held in trust by the Government for the sole use and benefit, the same, with the interest thereon, to be at all times subject to appropriation by Congress for their education and civilization. . . .
>
> As to the equalization of allotments on the basis of 160 acres, provided in the bill, *when viewed in the light of the fact that the additional allotments are in lieu of any residue which, under their title, these Indians could have reserved for the future benefit of their families,* and the further fact that they are soon to assume the responsibilities of citizenship, with all it implies respecting the moral and material welfare of their families, we think that the departure from the general allotment act of 1887 in the case of these Indians is just and proper and should be allowed. This policy is recommended by the Commissioner of Indian Affairs in his last annual report.
>
> This reservation contains 918,780 acres of agricultural lands, 127,887 of which have been allotted to the Sisseton and Wahpeton Indians under the act of Congress approved February 8, 1887 (24

Stats., 388). The additional allotments, as provided in article 4 of the agreement, will require 112,113 acres, making a total of 240,002 acres, which leaves a surplus, *including* the lands occupied by the agency and missionary societies, of 678,778 acres, *the Indian title to which will be extinguished by the terms of the agreement.* The cost of the purchase, at $2.50 per acre, will amount to $1,696,945, which is to be a trust fund held by the United States for the benefit of these Indians. The appropriation named in the bill is estimated to cover the purchase, and pay the back annuities.

Respecting the purchase price of the surplus lands, $2.50 per acre would, at first thought, appear too high; but considering the situation of this tract and the character of the land, in respect to its exeptional fertility and commercial value, the price is not unreasonable. This tract is well timbered and watered, which greatly enhances the value of prairie lands for general agricultural purposes, and besides it is surrounded by populous and prosperous agricultural communities in Minnesota and the two Dakotas, and is also easily accessible by railways. With sundry amendments relating only to the execution of the provisions of the bill, we recommend that the agreement be ratified and confirmed and that the bill as amended do pass. S. Rep. 661, 51st. Cong., 1st Sess. 1,3-4 (1890) (emphasis added).

It was not until May 17, 1890, that the Bill was presented for debate and then there was no debate at all—a four section standard amendment, one of which provided for homestead entry, was inserted and agreed to, and the Bill passed the Senate. 21 Cong. Rec. 4828 (1890).

In the meantime, Bill H.R. 9192 had been introduced in the House by Mr. Hall from the Committee on Indian Affairs on April 9, 1890. 21 Cong. Rec. 3224 (1890). The report thereon

contains language similar to S. Rep. No. 661:[10]

> The Committee on Indian Affairs to whom was referred an agreement with the Sisseton and Wahpeton bands of Sioux or Dakota Indians for the purchase and release of surplus lands in the Lake Traverse Reservation, also a bill submitted by the honorable Commissioner of Indian Affairs to ratify and confirm the same, and for other purposes (Senate Ex. Doc. No. 66, fifty-first Cong., 1st Sess.), have carefully considered the same and respectfully submit the following report:
>
> The said agreement was duly executed December 12, 1889, under the authority conferred upon the honorable Secretary of the Interior by the fifth section of the act of Congress approved February 8, 1887 (24 Stats., 388).
>
> By the terms of said agreement the said bands of Indians agreed to cede, sell, relinquish, and convey to the United States all unallotted land within the reservation on the following conditions, to wit: That a restitution be made of certain annuities claimed by them to have been wrongfully withheld; that additional allotments be made so as to secure to each member of the bands, without regard to age, sex, or condition, 160 acres; that the purchase price of the surplus lands shall be fixed at $2.50 per acre, and that the proceeds thereof be held in trust by the Government for their sole use and benefit, the same with accrued interest, to be at all times subject to appropriation by Congress for their education and civilization. . .
>
> The records of the Indian Office show that the Lake Traverse Reservation contains 918,780 acres of agricultural lands, and that 127,887 of which have been allotted under the act of February 8, 1887 (24 Stats., 388). It will require to make the additional allotments, as provided in article 4 of the agreement,

10. Approximately eight of the nine pages in this report were also concerned with the "loyal scout claims." S. Rep. 661, 51st Cong., 1st Sess. (1890).

112,113 acres, leaving a balance or surplus of 678,778 acres, *the Indian title to which will be extinquished by the terms of the agreement.* We are of the opinion that the equalization of allotments on the basis of 160 acres, as provided in the agreement, in view of the fact that these Indians have for many years adopted civilized habits and agricultural pursuits, and are soon to assume the responsibilities of citizenship, with all it implies respecting the maintenance of their family obligations to provide for the future material welfare of their children, and the further fact that the additional allotments are in lieu of any residue which, under their title, they might have retianed for the minor children of their respective families, is a just and reasonable provision. The policy of equalizing allotments in quantities of 160 acres is recommended by the honorable Commissioner of Indian Affairs in his annual report, and he heartily approves this article of the agreement. (See his letter of January 28, 1890, submitted as a part of our report).

The stipulation in Article II of the agreement, fixing the purchase price at $2.50 per acre, would appear perhaps at first thought, too high, but taking into consideration the character of the tract, being well supplied with water and timber, its exceptional fertility; the average value of the unimproved lands in the vicinity of this reservation, surrounded as it is with the populace and prosperous agricultural communities of the Dakotas and Minnesota, and its accessibility by railways, we think the price is just and equitable and within the purview of the act of February 8, 1887 (23, Stat., 388). . . .

We have further amended the bill providing for the purchase of the sixteenth and thirty-sixth second sections by the States wherein it is located, also limiting the settlement of the surplus lands to entries under the homestead laws, and requiring the entrymen to pay $2.50 per acre before patent shall issue, and prescribing the mode of payment. With the amendments indicated in this report, we

recommend that the agreement be ratified and confirmed and that the bill for carrying out its provisions do pass. H.R. Rep. 1356, 51st Cong., 1st Sess. 1,8,9 (1890)(emphasis added).

This bill was evidently tabled when the Senate passed the version referred to above two days later.

The version that passed the Senate, S. 3216 was referred to the House on May , 1890, and sent to the House Committee on Indian Affairs. 21 Cong. Rec. 4947 (1890). On June 3, 1890, Mr. Gifford, from the House Committee on Indian Affairs presented the Senate Bill, with an amendment:

Mr. GIFFORD, from the Committee on Indian Affairs, reported with amendment the bill of the Senate (S.3216) to ratify and confirm an agreement with the Sisseton and Wahpeton bands of Dakota and Sioux Indians, and for other purposes, accompanied by Report No. 2271. . .21 Cong. Rec. 5566(1890).

It was then placed on the House Calendar but for some reason did not come up for debate until September 29, 1890. On that date it was again Mr. Gifford who presented the Bill:

Mr. PERKINS. I yield to the gentleman from South Dakota [Mr. Gifford].
Mr. GIFFORD. Mr. Speaker, I desire to present the following Senate bill which I sent to the Clerk's desk. The Clerk read the title of the bill as follows:
A Bill (S. 3216) to ratify and confirm an agreement with the Sisseton and Wahpeton band of Dakota or Sioux Indians, and for other pruposes.
Mr. GIFFORD. Mr. Speaker, with the permission of the House, I will make a brief statement with regard to this Bill.
Mr. KILGORE. Let the bill be read.
Mr. GIFFORD. It is a long bill, and I will make a

brief statement as to its provisions if there is no objection.

The SPEAKER pro tempore. Without unanimous consent is given the bill will have to be read at length.

Mr. GIFFORD. I want to make a brief statement before the bill is read, if I may have unanimous consent to doso. This bill ratifies an agreement made with Indians in South Dakota, something like one thousand Indians, for the *cession or opening* to settlement of a portion of their reservation. The portion opened to settlement amounts to about 700,000 acres of land 678,000 acres. There are something like 900,000 acres in the total reservation. These Indians have all taken their allotments. They are civilized Indians, not blanket Indians. There remained unallotted for their use and benefit 112,000 acres in round numbers. By the terms of the agreement it is proposed to pay to these Indians the sum of $2.50 per acre. The agreement is perfectly satisfactory to the Indians and to all the parties concerned. The $2.50 per acre will be paid back by the settlers, or, in other words, the Government is reimbursed for the value of the land paid to these Indians for the land. It will be paid back into the Treasury of the United States by the settlers whenever the land is taken and occupied for settlement which will be at once.

In addition to that there is a provision in the bill paying to these Indians something like $450,000 in round numbers for back annuities. These Indians were a part of the Wahpeton band in Minnesota. In 1862 the Government stopped their annuities. About that time a certain number of this band enlisted in the Army of the United States. They served under Sully and Sibley in the Indian Wars of the Northwest and some of them, I think, went south. A provision in this bill proposes to reinstate the annuities of these loyal Indians, but only of the loyal Indians. That, in substance, is a statement of the provisions of the bill. I do not ask to have the bill read at length unless these gentlemen desire it,

or unless it will obviate the necessity of going into Committee of the Whole. I do not care to take up the time of the House.

Mr. HOOKER. Does this bill contain an appropriation of money?

Mr.. GIFFORD. Yes

Mr.. HOOKER. Then let it go to the Committee of the Whole.

Mr. GIFFORD. Do you insist upon the objection?

Mr. HOOKER. I think so, yes.

Mr. GIFFORD. I would very much desire to have the bill disposed of before Congress adjourns.

MR. HOOKER. There is no objection to that. This will not prevent its being considered at all.

MR. GIFFORD. We will have to withdraw the bill, then, if the gentleman insists.

Mr. PERKINS. I yield to the gentleman from Oregon (Mr.HERMANN) for the purpose of calling up a bill. . .21 Cong. Rec. 10699-10700 (1890)(emphasis added).

From this date forward, the Sisseton-Wahpeton Agreement would never again receive individual attention from the members of Congress. S. 3216 was not placed before either the House or the Senate again and it is .. not until February of the next year that the agreement emerges from the Washington maze.

Since the introduction of the Indian Appropriation Bill in the latter part of January, 1891, the House had been engaged in a general discussion of the various aspects of the Indian question. Nothing of earth-shaking consequence appears in over fifty pages of the *Congressional Record* that now record the general opinions of the Congressmen on everything from Indian education to Indian wars.

However, on February 16, 1891, Congressman Perkins, a representative from Kansas, proposed an amendment to the

Indian Appropriation Bill that would throw both houses of Congress into a general debate for over a month. This amendment incorporated the complete text of five cession agreements, one of which was the Sisseton–Wahpeton Agreement.[11] 22 Cong. Rec. 2762 (1891).

The fact that five agreements were considered *in toto* is as far as Petitioner is concerned, both advantageous and disadvantageous: Advantageous in that the information that can be gleaned from the extended remarks by the Congressmen on just about every type or variation of cession agreement that had ever existed provides some remarkable insight into what Congress meant by the cession and opening of a reservation or parts thereof in general; disadvantageous in that the Sisseton–Wahpeton Agreement received very little individual attention and therefore what could have been an excellent source from which to determine congressional intent does not even exist for all practical purposes.

For example, but for the reading of the text of the agreement and the amendments into the Record, all of the extended remarks on the Sisseton-Wahpeton Agreement specifically, could be condensed to less than four pages.[12] The first of these remarks was on February 17, 1891, when a Mr. Holman of Indiana was apprehensive about whether the lands would be opened under the Homestead Law and hence preclude speculation:

11. Four of the five, were pure cession agreements. The fifth, the Sisseton-Wahpeton agreement, was a cession agreement tailored to the Dawes Act of 1887. See 52-74 , *supra*.

12. Because this portion of theCongressional Record is the debate on what would eventually become the Act of March 3, 1891, petitioner has set forth, *infra*, the entire text of that portion of the debate which was concerned with the Sisseton-Wahpeton agreement.

Mr. HOLMAN. I wish to say to my friend from Arkansas [Mr.PEEL] that the main objection to this amendment and especially to the treaties with the Sioux of North and South Dakota, and with the Coeur d'Alene Indians, is this: That the lands are to be disposed of upon a principle entirely different from that contemplated by the homestead law. In view of the fact that the lands we are now acquiring from the Indians with the exception of the western portions of the Indian Territory, are the best lands remaining, and the only ones, practically, which are adapted to settlement without irrigation, it does seem to me that if there ever were any lands to which the homestead feature of the law ought to apply, it should apply to these lands.

I think, notwithstanding the fact the $1.25 an acre has to be paid for some of these lands, namely, those ceded by the Coeur d'Alene Indians, and that $2.50 an acre is to be paid for those ceded by the branch of the Sioux Indians in the Dakotas–notwithstanding these payments are to be made, that is no reason whatever why the homestead principle should be abandoned. *I insist upon that as the only way in which you can prevent speculation in your public lands*, and I trust my friend from Kansas [Mr. PERKINS] will not even desire that the disgraceful scenes witnessed in the settlement of Oklahoma shall again occur in this country; the spectacle of speculators seeking to seize land, and then pressing upon Congress legislation in violation of the principles of the homestead law, by which to acquire their title.

Mr. PERKINS. My friend will allow me to suggest that at the time he speaks of the only provision of law opening these lands to settlement was the homestead law.

Mr. HOLMAN. Well, not strictly; but the hope was mainfestly held out that that law would be modified.

Mr. PERKINS. Oh, no.

Mr. HOLMAN. I live in a section of the country from which there was a heavy emigration to Oklahoma. As a general rule persons went there for the purpose of speculation and not for the purpose of obtaining homes.

Mr. GIFFORD. If my friend from Indiana will permit

me, I will say that under the agreement ratifying the treaty made with the Sisseton and Wahpeton Indians the lands are only *open to homestead settlers*, and they are to be paid for rate of $2.50 an acre.

Mr. HOLMAN. But the provision is deceptive, as my friend will see.

Mr. PICKLER. Oh, no, it is not.

Mr. GIFFORD. The gentleman will see by referring to section 5—

Mr. PERKINS. If the gentleman wishes to offer an amendment covering the provisio / that he states I will not interpose any objection.

Mr. ROGERS. That is right.

Mr. HOLMAN. I want to say to my friend that the provisio he refers to reads as follows: *Provided*, that the settlers upon said lands shall be permitted to purchase the same at the rate of $2.50 per acre, one-fourth to be paid in cash and the balance in three equal annual installments until paid, and patents shall not issue until the settlers or entrymen shall have paid to the United States the sum of $2.50 per acre.

My friend will see that nothing is said about the homestead law.

Mr. GIFFORD. But in Section five of that bill that is provided for.

Mr. HOLMAN. Section Five does not apply here.

Mr. GIFFORD. I do not agree with the gentleman about that. But in any event we are perfectly willing to accept an amendment making the *lands open to homestead settlers only*, because that is what we want.

Mr. HOLMAN. I propose this amendment:

Provided, further, That all the lands *ceded* to the United States by said treaties which shall be subject to entry and settlement shall be disposed of under the provisions of the homestead law in all respects whatever, except as to the payment therefor, as provided by law, and except also as to Section 2301 of the Revised Statutes, which shall not apply to such lands. Those are the two exceptions I wish to make.

Mr. PICKLER. What is the Section of the Revised Statutes which you provide shall not apply?

Mr. HOLMAN. That is the commutation clause. I wish

to call my friend's attention to the fact that if the $2.50 sales are made, retaining that section, then at the end of six months, unless the bill is amended, a purchaser may pay the $2.50 an acre, which opens up this whole great body of land to speculation; a thing that ought not be thought of at this time.

Mr. GIFFORD. I, for one, am willing to accept the amendment, because I wish to see the same object accomplished which the gentleman intends.

Mr. PERKINS. I wish my friend from Indiana would send his amendment to the Clerk's desk so that it may be read. I did not quite comprehend it.

Mr. HOLMAN. This will require that the several provisions shall be stricken out which would be in conflict with this.

Mr. PERKINS. Certainly.

Mr. WILSON, of Washington. I want to ascertain the gentleman's views on this matter.

The CHAIRMAN. The amendment of the gentleman from Indiana will be read.

The Clerk read as follows: *Provided, further*,

That all the lands *ceded* to the United States by said treaties which shall be subject to entry settlement shall be disposed of under the provisions of the homestead law in all respects whatever, except as to the payment therefor, as provided by law, and except also as to section 2301 of the Revised Statutes, which shall not apply to such lands

Mr. HOLMAN. Now, Mr. Chairman, I wish to say but one word further. With the understanding that the proposition shall be accepted, and also that all the provisions in conflict with the provision shall be modified, I shall not so far as I am concerned, press the point of order.

Mr. PERKINS. I hope, Mr. Chairman, that that may be done.

Mr. WILSON, of Washington. Does the section of the Revised Statutes apply to the commutation?

Mr. HOLMAN. Yes, sir.

Mr. WILSON, of Washington. And you want to eliminate that?

Mr. HOLMAN. Yes, sir. I wish to call the attention of

the gentleman to the fact that, as to these two bands in South and North Dakota, *I think the vast body of land in the Dakotas occupied by the Sisseton and Wahpeton bands of Indians would go to the speculators if some such provision were not applied.*
Mr. PEEL. That amendment is acceptable.
The CHAIRMAN. Does the gentleman understand that the point of order is not pressed, and that this amendment is accepted?
Mr. HOLMAN. This amendment is to come in at line thirteen; and also the other proposition, that the other provisions of the bill be made to conform to it.
Mr. PERKINS. Certainly.
The CHAIRMAN. Is the point of order withdrawn?
Mr. HOOKER. I want to say a word upon that.
The CHAIRMAN. The gentleman from Mississippi.
. . .22 Cong. Rec. 2809-2810 (1891) (emphasis added).

The second reference to the Sisseton-Wahpeton Agreement was in the Senate on February 27, 1891. In response to a statement by Senator Dawes that the agreement incorporated in the amendment had separately passed the Senate previously and those now in the amendment were simply copies thereof, Mr. Pettigrew remarked:

Mr. PETTIGREW. I think the statement of the Senator from Massachusetts is entirely correct, except as to section 26, on page 203, with regard to the agreement with the Sisseton and Wahpeton Indians of South Dakota. In that instance the Senate passed a different provision with regard to the disposition of the lands of those Indians.
Mr. DAWES. Mr. President, I am bound to correct myself, not only as suggested by the Senator, but to this extent as to each of them. In them all we have changed in this appropriation the price per acre, and we have provided that it shall be $1.50 per acre as to all of them except the Sisseton, which is to be $2.50 an acre, because that is what we paid to those Indians; and we have provided that it shall be paid by the homesteader

in full within five years from the date of his first entry, and that one-half of it shall be paid in two years. Those changes as to the disposition of the lands enter into the seven agreements. I think I have stated it correctly now.
We have also modified the disposition of the land. Of course it is beyond our power to modify the agreements. The agreements are *in haec verba* as made by the commissioners, as read in the Senate, and as adopted by the Senate in separate bills.
Now, Mr. President, I would like to escape the reading of that which it is proposed to strike out, and which is sixty or seventy pages, and the placing in its place of some number of pages, as I have suggested.
Mr. CALL. Mr. President ——
The PRESIDING OFFICER. Does the Senator from South Dakota [Mr. PETTIGREW] yield to the Senator from Florida [Mr. CALL]?
Mr. PETTIGREW. No, sir. There is one additional feature, and that is this: The bill, as it passed the Senate, gives the Sisseton and Wahpeton Indians 5 per cent interest upon their permanent fund, and this is the amount of interest which the United States has paid to the Sioux Indians upon the Sioux reservation [Great Sioux, *supra*] and to the Indians in the Indian Territory. It seems to me that these Indians who have been friendly to the Government, not only in the past, but always, even during the Minnesota difficulty in 1862, ought not to be deprived of this 2 per cent interest. 22 Cong. Rec. 3453 (1891).

The third reference was also made by Mr. Pettigrew in the Senate and again was initially concerned with the "interest" question:

Mr. ALLISON. I should like to know why this change is to be made?
Mr. PETTIGREW. The amendment which I have offered is exactly the same as a bill which passed the Senate with regard to the disposition of these lands, except that it requires the homesteader to pay $1.50 per acre instead of $2.50 per acre and reserves for the benefit of

the public schools sections 16 and 36.

Mr. DAWES. So far as the last suggestion of the Senator is concerned, the Senator from Montana [Mr. SANDERS] has an amendment which applies to all of the agreements, prescribing that the sixteenth and thirty-sixth sections in all cases shall be reserved for schools.

The reason why it is proposed to have the settler pay $2.50 for this land is because the land was of such value that we were obliged to pay that sum for it to the Sissetons and Wahpetons under the agreement. *We have paid a very large sum for this land, larger in proportion per acre than under any of the other agreements.* Therefore it was deemed wise that we should recover it back from the settler. It was stated by the commissioners before the Committee on Indian Affairs that this land was so valuable that it would be taken at $3 or $4 or $5 an acre, and it was suggested that we fix the price at $2.50 an acre, which they thought ought to be the minimum price for it. We should thereby come somewhere near reimbursing ourselves for the large sum paid for this land to the Sissetons and Wahpetons.

Mr. EDMUNDS. How much do we pay the Indians?

Mr. DAWES. Two dollars and a half an acre. I hope, therefore, the amount fixed in the bill will not be reduced.

Mr. MORGAN. There is another reason connected with it, and that is that 160 acres is the largest amount that a man can buy of this land. It was supposed by the committee that, being confined to 160 acres at $2.50 an acre, the land being worth it, and worth a good deal more, *it would draw into that country a better class of population*, which was thought to be a good move.

Mr. EDMUNDS. Then we ought to disagree to the amendment of the Senator from South Dakota.

Mr. PETTIGREW. I wish to say that these are agricultural lands. As to the Coeur d'Alene reservation, under this same bill the settler is required to pay but $1.50 an acre, although we have agreed to pay over $500,000 for less than 200,000 acres, and I can see no reason why there should be any discrimination against the lands on the Sisseton and Wahpeton reservations.

Mr. DAWES, Let me read a little from this agreement:

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the sum of $2.50 per acre for each and every acre thereof.

Then it is agreed that the sum so paid shall be paid as provided in detail in the agreement. *Now, if we pay the Indian $2.50 an acre for this land and open it to settlement, the settler should be required to pay $2.50 an acre.*

Mr. PETTIGREW. I will answer the Senator from Massachusetts. *Under the agreement made heretofore with the Indians we have bought their lands and opened them to settlement under the homestead law at $1.25 per acre.* Under this bill we purchase the Coeur d'Alene reservation and pay $500,000 for 185,000 acres of land which is to be open to settlement at $1.50 per acre, and yet in the agreement with the Sissetons and Wahpetons this bill requires that the settler shall pay $2.50 an acre for lands which are purely agricultural and only suitable for settlement, and which I believe should be opened to settlement under the provisions of the homestead law.

There is no provision in this bill or in the ratification of any of these agreements which requires any settler to pay over a dollar and a half an acre, except in the land to be opened for settlement in the Sisseton and Wahpeton Reservation. I can see no reason why that exception should be drawn as to those lands. It is questionable whether they are as valuable as other lands which are to be opened under these agreements.

Mr. MORGAN. They are generally worth more than $2.50 an acre.

Mr. PETTIGREW. That is exceedingly doubtful, and I question whether they will be settled under the provisions of this proposed law, which requires the payment of $2.50 an acre.

Further than that, my amendment requires that sections 16 and 36 shall be donated for the purpose of supporting the common schools of the State of South Dakota. If that provision were rejected as to every

reservation in the State of South Dakota when we were admitted into the Union, we would have lost more than half of all the school lands donated to the State, which would be unjust and unfair, and inasmuch as we received no grant of swamp lands whatever–

Mr. DAWES. If the Senator will allow me, $2.50 an acre is not all we give to these Indians, for in article 3 of the agreement it is provided.

The United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of $342,778.37, being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people when at war with the United States.

So that we have to make an appropriation of $342,778.37 for these Indians in this bill. 22 Cong. Rec. 3457-3458 (1891).

Three days later, with the bill in its final form, the question concerning the price the settlers were to pay the United States government for the land was raised once more:

Mr. HOLMAN. . . .I would like to have the gentleman state the action taken in regard to the Sisseton lands.

Mr. PERKINS. I will say that the Senate amended the bill so that the lands should be opened to settlement only under the homestead laws of the United States, and the town-site laws, and the settlers are charged $2.50 per acre for the Sisseton and Wahpeton lands.

Mr. HOLMAN. For the whole of it?

Mr. PERKINS. For the whole of them.

Mr. HOLMAN. How is it as to the other lands?

Mr. PERKINS. *All are opened to settlement under the homestead law,* but the settlers are required to pay $1.50 per acre for the Coeur d'Alene lands, *and for the Fort Berthold and the Crow lands $1.50 an acre; and so with all the lands opened to settlement by the provisions of this bill except those acquired by the Sisseton and Wahpeton agreement, for which the settlers are to pay $2.50 per acre.*

Mr. HOLMAN. Now, in regard to the homestead provision. Is there any modification whatever in that?

Mr. PERKINS. None whatever; in fact, the Senate bill and the bill we have agreed upon is not as liberal in that particular as the bill we passed in the House. In the House we gave to those who had exercised the privilege of locating upon the prairies of the West under the homestead law, but who had subsequently lost their lands by contests, dry seasons, or misfortunes, the opportunity to take these lands in Oklahoma the same as those who had never settled upon public land under the homestead law; but it was thought by the Senate conferees that this right was extended under the recent act of Congress repealing the pre-emption law, and so we receded from our disagreement.

Mr. HOLMAN. The balance of the homestead law, so far as applicable, except the section repealed, 2301, is covered by the bill.

Mr. PERKINS. The provisions of the homestead law are respected and upheld as to all the lands covered by the bill except as we amend the amendment of the Senate so as to preserve to the late Union soldiers and sailors the special privileges conferred upon them under the homestead law except as they pay the same price as the other settlers–

Mr. HOLMAN. Then except as to the last feature, which is expressed in the homestead law, the other laws are applied.

Mr. PERKINS. Except as before suggested, the lands are to be paid for by the settlers.

Mr. MANSUR. You charge the settlers $2.50 an acre for this land, which is a very poor illustration of the doctrine that you held that you wanted these lands for the poor.

Mr. PERKINS. *We paid the Indians for* them. *We paid for the Sisseton and Wahpeton lands $2.50 an acre.* It is said they are worth more than that. The commissioners who visited those Indians and conducted the *treaty* believed that they were worth $2.50 an acre, and consented to pay the Indians that price for them. In the Senate, as well as in the House, it was thought right to

charge the settlers $2.50 an acre for them, and the bill as it passed the House charged the settlers for the lands the price paid the Indians for them. 22 Cong. Rec. 3784 (1891). [13]

The final reference to the Sisseton-Wahpeton Agreement was made on the day of passage:

> Mr. GORMAN. Now, do I understand the Senator from Massachusetts to say that provision is made here for the Government to charge the settler the same amount per acre that Government has paid to the Indian for this land?
> Mr. DAWES. Mr. President, the bill on its face, as nearly as it can be ascertained (there being some indefinite appropriations connected with it), is about $16,000,000. The Indian appropriation bill proper contains about $7,200,000. *The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the surrender of a large portion of their reservations to the public domain. In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. All this land is opened by this bill to settlement as part of the public domain upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians for the surrender $2.50 per acre.* 22 Cong. Rec. 3879 (1891) (emphasis added).

13. The only other reference to the Sisseton-Wahpeton Agreement in the *Congressional Record* involved an emergency clause:

> Mr. COCKRELL. I would like to ask the Senator in charge of the bill what is the change made in the amendment numbered 39?
> Mr DAWES. The report adds at the end of the amendment the words "to be immediately available." That is all the difference there is.
> Mr. COCKRELL. "To be immediately available?"
> Mr. DAWES. Yes
> Mr. COCKRELL. Instead of waiting until the end of the fiscal year?
> Mr. DAWES. Exactly. Because those Indians were represented at the Department and by Senators here to be in a very distressed condition, it was thought better that the appropriation should be available in the spring rather than to wait until July. That is all. 22 Cong. Rec. 3877 (1891).

The Bill passed the Senate a few minutes later and therefore, as the Court can see, very little specific information exists in the *Congressional Record* to aid this Court in the construction of the specific Act under consideration. However, as exemplified by the last remark of Senator Dawes, there does exist information from which Petitioner thinks an accurate insight can be gained into the continuation of the whole cession policy in general and its necessary effects on the boundaries of any reservation or portions thereof and in this respect aid the Court to consider the Sisseton-Wahpeton Act in its proper historical perspective. As Senator Dawes stated:

> Mr. DAWES. Mr. President, the bill on its face, as nearly as it can be ascertained (there being some indefinite appropriations connected with it), is about $16,000,000. The Indian appropriation bill proper contains about $7,200,000. The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians *for the surrender of a large portion of their reservations to the public domain.* In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. *All this land is opened by this bill to settlement as part of the public domain* upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians *for the surrender* $2.50 an acre. 22 Cong. Rec. 3879 (1891) (emphasis added).

In this one paragraph, the most influential and knowledgeable man that has ever participated in Indian Affairs in Congress sums up precisely and in clear and unambiguous language the sum total of congressional policy with respect to any cession agreement—and irrespective of whether it was tailored to conform to the Dawes Act of 1887. *The thrust of the whole process was to simply obtain a surrender of a reservation or a portion thereof to the public domain for the purpose of providing additional land to homesteaders, or in a more shorthand descriptive terminology, to "open the reservation" to homesteading.* More important than this singular remark however, is the fact that the exxence of what is stated therein is repeatedly and expressly confirmed throughout the 250 other pages of the *Congressional Record* concerned with this Indian appropriation bill. Of course the 1887 Dawes Act was directly and indirectly involved. Most importantly, the individual members of the tribe were thereby assured of some permanent remnant of land via allotment and no "openings" or "cessions" would be had in derogation thereof.

But the crux of the whole process remained the same as the remarks of the other members of Congress indicate:

> Mr. PERKINS. Mr. Speaker, this bill is an important one. All the pending agreements or treaties for the *purchase of Indian lands* are ratified and confirmed by the provisions of this bill. Some of these agreements have been pending for Congressional action for many months. They had been negotiated with care, by mean of ability and integrity, and good faith with the Indians, as well as justice to the pioneer settlers, demanded their approval and ratification.
>
> The bill carries the largest appropriation ever carried by an Indian appropriation bill, but *it extinguishes the Indian title to a great domain and opens it to settlement* by the hardy and progressive pioneers who in a short period of time will convert it into the abiding place of

> patriotic and enlightened homes, adding much to the development and prosperity of our common country. 22 Cong. Rec. 3784 (1891) (emphasis added).
>
> Mr. GORMAN. . . . . Now, Mr. President, I think I have the right to characterize this as the most extraordinary proceeding. After spending the time here from the 1st Monday of December, during the whole Congress, in considering public matters, *we come for the first time to an Indian appropriation bill to deal with seven or eight treaties, to ratify them, to make provision for the disposal of the public lands that we have acquired by those treaties by the million acres,* in the very last hours of the session, when no Senator of the Committee on Appropriations or in this body can possibly know what this bill means, or how much is involved, or what will be the result of the *disposition of the public lands. . .*
>
> The amount of money that the Senator from Massachusetts says is involved in these treaties is over $6,000,000. That is only a small part of it. The questions *how far the public lands have been disposed of* and in what way I have no doubt the Senator has investigated and the members of the Indian Committee have investigated to the very best of their ability in the time they have had to work, far into the night, to try to get the bill into shape.
>
> Mr. MORGAN. . . .We had better proceed to ratify these treaties, these agreements, because the main part of the agreements not only relates to the *disposition of the public lands amongst the settlers,* but the agreements are all drawn up, they are signed by one Indian and another and another until we say that we have a majority of two-thirds or three-fourths—I forget which it is—of all these different tribes. The agreements are all embodied in writing. There is nothing to be done about them.
>
> When we adopt this bill the statute will not change all these agreements. We do not pretend to make any modification or amendment of the agreements themselves. We merely ratify those, and then we take the estate we have acquired in this way, and after providing for the payment of the money, or whatever it is we have agreed to pay these Indians, *we take these landed estates and parcel and divide them out among*

> *the people in a fashion that we think is the most conducive to the occupancy of that country* by a n honest, laborious, earnest, and faithful set of people. . . . Mr. CALL. . . .They are intended to afford an outlet for the great ma ss of our people who are suffering from the economies which have existed during the existence of the Government. They are a great relief to the people, and they should be *opened for settlement* at the earliest possible day. 22 Cong. Rec. 3454 .3455 (1891) (emphasis added).
>
> Mr. GORMAN. Mr. President, I stated last night that, for the first time, so far as I know, in the history of legislation we find seven or eight treaties to be ratified tacked on an appropriation bill, which came in at so late an hour of the session that no member of the Committee on Appropriations, so far as I know, other than the Senator from Massachusetts, who is the chairman of the Committee on Indian Affairs and who had considered nearly all these questions in separate bills, can tell the Senate what is contained in the proposition. Of course we know that if these treaties are ratified we must appropriate $6,000,000 and *make provision for the disposition of from three to five or six million acres of the public domain; but it is done in such a way that I can not explain it to the Senator.* 22 Cong. Rec. 3527 (1891) (emphasis added).

In this respect one would expect to find the position of Petitioner supported in the text of, and documents relating to, each of the separate cession agreements. After all, Senator Dawes and the other members of Congress had explicitly referred to and considered the ratification of the agreements would restore so many acres of land to the "public domain." [14] Certainly, in no instance is there any indication from any member of Congress to infer otherwise. Admittedly, each of the

14. See, the specific remarks of the Commissioner of Indian Affairs attributing the same effect to the Sisseton–Wahpeton Agreement, *supra*, at 4, 5.

agreements were, as Senator Dawes stated, "agreements made with these Indians by which they have agreed to surrender to the United States about ten million acres of land upon *different* terms agreed to with different tribes of Indians." 22 Cong. Rec. 3453 (1891). And the terms of the agreements did vary as indicated by the comments of Senator Sanders.

> Mr. SANDERS. . . .I regret as much as any one that these agreements have come here in the shape they have. There are no two of them alike, although they were all prepared in the Indian Office in Washington. *Their crudeness would not justify the suspicion that they had been written by lawyers familiar with this subject.* The treaties themselves, as to that which is purchased by the United States, vary, and I desire to describe them briefly.
>
> In some of the agreements all lands within given exterior lines are sold by the Indians to the United States. *This sometimes is all the land they own, but generally is only a part of the reservation.* Second, in other treaties all lands are sold that have not been allotted to Indians in severalty, and as to these lands that are allotted a deduction is made. Third, there is here another class of agreements where all lands are sold except those which have been allotted and those which shall be allotted hereafter, and the time is prescribed in which the allotment shall transpire. 22 Cong. Rec. 3547 (1891) (emphasis added).

But in terms of the issue before this Court, the effect of ratification remained the same–irrespective of the fact that the Sisseton-Wahpeton cession had been tailored to the Dawes Act.

Unfortunately, allocation of time and resources do not permit Petitioner to examine and present the documentation and surrounding circumstances of each of the other pure cession agreements which contain material relevant to the

determination of the issue herein. However, for purposes of a general discussion and clarification, in addition to substantiating our position with respect to the continuance of the crux of the cession policy as modified by the Dawes Act, in general, the agreement with the Crow Tribe is deserving of some analysis.

In the first instance, the 1890 agreement with the Crow Tribe of Indians is of the type wherein only a portion of the unallotted land of the reservation was sold to the United States; in this respect the situation is on nearly "all fours" with the hypothetical partial opening set forth at 9-12, *supra*. Hopefully, it also should serve to establish some sort of historical perspective to aid this Court in considering the more difficult (*See*12-13, *supra*) but in all respects analagous situation when all of the unallotted land of a reservation is opened at once, as in the instant case.

C. THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES OF THE SUM CERTAIN CESSION AGREEMENT OF THE CROW TRIBE, WHICH WAS RATIFIED BY CONGRESS ON THE SAME DAY, IN THE SAME BILL AS THE SISSETON-WAHPETON AGREEMENT, BUT WHICH WAS NOT TAILORED TO THE DAWES ACT OF 1887, CONCLUSIVELY ESTABLISH THAT CONGRESS DID NOT ALTER THE FUNDAMENTAL PRECEPT OF THE CESSION AGREEMENTS.

1. General Background And Similarity.

The history of the Crow negotiations follows the same general pattern as the Sisseton-Wahpeton and others. The areas bordering the western portion of the reservation became populated and certain citizens began to lobby for the opening of a portion thereof. Eventually, Congress responded by enacting authorization providing:

> That the Secretary of the Interior is authorized and directed to appoint a commission consisting of three discreet persons, whose duty it shall be to negotiate with the Crow Indians for a surrender to the United States of all that portion of the reservation in Montana, or so much thereof as they will consent to surrender, . . . and to report to Congress the result of any such negotiation. But no agreement for any such surrender shall be valid until ratified by Congress. 21 Cong. Rec. 8778 (1890).[15]

As was the case in the Sisseton-Wahpeton negotiations, a portion of the Crow Reservation was allegedly a "barrier to settlement" and a "positive detriment" to the people of the state, as indicated in the House and Senate Reports:

> It will thus be seen that on the north, the west, and the south, this occupied portion of the Crow Reservation is surrounded by thrifty settlements of people devoted to the development of the resources of the contiguous country. This portion of the reservation constitutes a *barrier*, separating the people of the Yellowstone Valley from the settlements south of the reservation, and is, therefore, not only unproductive, but in its *present* condition, *under the jurisdiction of* the General Government *and not subject to settlement in any way*, this west end of the Crow Reservation is a positive detriment to the people of Montana, of no value whatever to the Crow Indian tribe. H.R. Rep. No. 80, 51st Cong., 1st Sess. 2 (1890).

Pursuant to the authorization, the Secretary of the Interior immediately dispatched a Commission that with all due diligence procured an agreement with the members of the Crow Tribe on December 8, 1890. The transcript of the negotiations, while not as lengthy, contained remarks similar to the

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15. Earlier negotiations with members of the Crow Tribe were attempted but unsuccessful.

Sisseton-Wahpeton transcript:

> Mr. RICHARDSON. . . .The Great Father has sent us here on a mission: that mission is to talk to you about *buying a part of your land.* He desires to purchase a portion of your reservation for which he thinks you have little use; if he did not think so he would not have sent us. . . .Now the Great Father wants to *buy that land* and take the money and give it all to the Indians in various ways. . . .S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 10 (1891) (emphasis added).

Some of the members of the Crow Tribe opposed the sale and others did not. Both continually referred to the business at hand in the same terminology:

> OLD DOG. . . .If they *sell you the reservation* don't let any cattlemen on it, except Williams. . .
> PLENTY COOS. I want the commission, if I give my consent to *sell the land,* to promise to fix the Indians over on the Clarke's Ford, build them ditches and houses and fences, *those that remain there.* If white men come and settle close to the Indians I want good white men for neighbors. You see these people here, I could hold them a good while but they will do as the Great Father wishes. How many cattle will we get? S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 12-13 (1891) (emphasis added).

The operative language of the agreement itself was simply:

> We, the undersigned, adult male Indians of the Crow tribe now residing on the Crow Indian Reservation, in the State of Montana, do this 8th day of December, A.D. 1890, hereby agree *to dispose of and sell to the Government* of the United States, for certain considerations hereinafter mentioned, all that portion of the Crow Indian Reservation in the State of Montana, lying west and South of the following lines, to wit–S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 16 (1891) (emphasis added).

It did not even contain the term "public domain." Yet, in his Annual Report to the Secretary of the Interior for 1891, the Commissioner of Indian Affairs also stated "the ratification of the agreement by the Act of March 3, 1891 (26 Stat., 989) *restored to the public domain*. . . from the Crow Reservation, Montana, about 1,800,000 acres." Report of the Commissioner of Indian Affairs, 44 (1891) (emphasis added). Admittedly, "Congress was fully aware of the means by which termination could be effected. . ." *Mattz* v. *Arnett,* 412 U.S. 481 (1973). But it did not alter the original Crow agreement to conform to any standard ". . . which *expressly* provided for the termination of the reservation. . . and did so in unequivocal terms." *Mattz, supra,* 412 U.S. at (emphasis added).

President Benjamin Harrison, as in the Sisseton-Wahpeton case, transmitted the agreement and accompanying documents to the Senate and House of Representatives on January 19, 1891. 22 Cong. Rec. 1550 (1891). The agreement was reported out of the House Committee on Indian Affairs on February 5, 1891, and in this respect was not altered in any way. The report simply referred to a "cession of land" and the "land embraced in this cession":

> The Commissioners estimate the quantity of *land embraced in the cession* at 1,800,000 acres, the price agreed to be paid being $946,000, or about 52 1/2 cents per acre. The Secretary of the Interior, in a letter dated January 17, 1891, transmitting to the treaty, together with the recommendations of the Commissioner of Indian Affairs to the President recommends the confirmation of the treaty. In a letter to the Secretary of the Interior dated January 16, the Commissioner of Indian Affairs in strong terms recommends that the treaty be confirmed, and in his letter sets forth substantial reasons why the good of the Indians and interest of the people of the United States would be served by the prompt ratification of the

> agreement. . .When *the cession of land* now proposed shall have been made. . . .H.R. Rep. No. 3700, 51st Cong., 2d Sess. 1, 4 (1891) (emphasis added).

On the floor of the House and Senate the agreement was again simply referred to as a "cession" or "sale" of surplus "land":

> Mr. SANDERS. The agreement is that the Crow Indians sell to us *all the lands within the limits described, except such lands as had at the date of the agreement been allotted to Indians.* This amendment provides that when we have *bought the land, paid for it,* and surveyed it, and, by proclamation of the President, *opened it and settled it,* under what is facetiously called by the Senator from Massachusetts [Mr. DAWES] the homestead law, *buying it* for $1 an acre, it shall be further reserved from every white man, from every citizen of the United States, until, within sixty days, Indians who have got their money from the United States can go on it and take up such of it as they choose. 22 Cong. Rec. 3548 (1891) (emphasis added).

With the agreement in its final form, as in the Sisseton-Wahpeton case, Senator Dawes stated:

> Mr. DAWES. Mr. President, the bill on its face, as nearly as it can be ascertained (there being some indefinite appropriations connected with it), is about $16,000,000. The Indian appropriation bill proper contains about $7,200,000. The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the *surrender of a large portion of their reservations to the public domain.* In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. All this land is opened by this bill to settlement as part of the *public domain* upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians for the surrender $2.50 per acre. 22 Cong. Rec. 3879 (1891) (emphasis added).

The agreement was ratified and became sections 31-34 of the Act of March 3, 1891 (26 Stat. 989).

Not one section of the Crow Act contains the term "public domain." There is no express or unequivocal terminology inserted by Congress–only the operative terminology of "sell and dispose." Of course no one could ever question what effect the Crow Agreement had on the boundaries of the Crow Reservation for the agreement was concerned *only* with a portion of the reservation–synonymous in all respects with the hypothetical partial opening discussed at 9-12, *supra*. Since a portion of the reservation was to remain intact it *necessarily* had to be delineated from the ceded portion. Thus the agreement on its face provided:

> SEC. 33. That the sum of seven thousand five hundred dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, *for the survey of the boundary line between the Crow Reservation and the lands ceded by said agreement,* . . . Crow Act of March 3, 1891 §33, 26 Stat. 1042 (1891) (emphasis added).

Similarly, the legislative history of the Crow agreement is replete with references such as the statement of the Commissioner of Indian Affairs contained in H.R. Rep. No. 3700 ". . . I have provided, both in the bill and in the item, for the cost of the survey of the *boundary line separating the ceded lands from the diminished reservation.* . . ." H.R. Rep. No. 3700, 51st Cong., 2d Sess. 4 (1891) (emphasis added). [10]

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10. After reservations were surveyed and subdivided into counties, such metes and bounds descriptions and general surveys of the boundaries of reservations were no longer necessary. If the unallotted land in a particular outlying county was ceded, the agreement could rely upon the description of the county.

In essence, the evidence of the congressional determination to terminate or disestablish in this case had to be, of *sheer necessity*, both ". . .on the face of the act. . ." and ". . .clear from the surrounding circumstances and legislative history. . . ." *Mattz, supra*, at .

Assume for a moment, however, that all of the unallotted lands of the Crow Reservation were the subject of this agreement. Logically, one would have an agreement to sell and dispose of all the unallotted lands within the Crow Reservation–*without the previously necessary* discussion of new boundaries and remained diminished reservation ". . .on the face of the act. . ." or in the ". . .surrounding circumstances and legislative history. . ." *Mattz, supra. There would no longer be a remaining or diminished reservation or reservation boundaries and hence no reason to discuss them.* All that would remain would be allotments situated on the newly created public domain–in effect, the same precise situation presented in the Sisseton-Wahpeton materials.

The argument of Petitioner is soundly supported in this respect by the treatment actually accorded those members of the Crow Tribe already allotted or desirous of taking allotments in the ceded portion of the Crow Reservation. On the first day of the council, Commissioner Richardson explicitly told the members of the Crow Tribe that the "Great Father":

> . . .has told us to give you $830,000 for this part of the reservation, and Indians who stay on ceded lands, if they wish to remain, will have all the rights and privileges of the tribe. . . .He proposes also to take a lot of money and pay the Indians that are on the land we want to buy for their improvements, so that if they come over on this part of the reservation and take up irrigated land they will be better off here than there *but any Indian that wants to stay there can do so.* S.

> Exec. Doc. No. 43, 5lst Cong., 2d Sess. 10 (1891) (emphasis added);

and the members of the tribe understood the ramifications of having their allotments so situated:

> PLENTY COOS. I want the commission, if I give my consent to sell the land, to promise to fix the Indians over on the Clarke's Ford, build them ditches and houses and fences, *those that remain there.* If white men come and settle close to the Indians I want good white men for neighbors. You see these people here, I could hold them a good while but they will do as the Great Father wishes.S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 13 (1891) (emphasis added).

In their report to the Secretary of the Interior, the members of the Commission reiterated that:

> Many of the Crows have had land allotted to them in severalty. During the past year the allotment agent in charge of this work on the reservation located *one hundred and thirty six allotments* on Clarke's Fork River. The Indians on these allotments strongly opposed the sale because it would leave them *outside of the retained portion of the reserve.* When the system of irrigation provided for in the agreement is in operation, large tracts in the valleys of the Little Horn and Big Horn Rivers will be made available for allotment, and as an inducement for the *Indians who live on the ceded portion to move upon the part retained* the agreement provides, in Section 11, that they shall have the right to surrender their allotments and select a new one upon the same terms at any time within three years. S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 8, 9 (1891) (emphasis added).

And Section 11 of the agreement reflected this concern:

> That all lands upon that portion of the reservation

> to be herein ceded, which prior to the date of this agreement have been allotted in severalty to Indians of the Crow tribe, shall be retained and enjoyed by them: *Provided, however,* That such Indians shall have the right at any time within three years to surrender his or her allotment and select a new allotment *within the retained reservation,* upon the same terms and conditions as were prescribed in selecting the first allotment. *It is further provided,* That every Indian who shall surrender an allotment within the time specified that has improvements upon it shall have like improvements made for him upon the new allotment, and for this purpose the sum of $5,000, or so much of it as may be necessary, is hereby appropriated and set apart. S. Exec. Doc. No. 43, 51st Cong., 2d Sess. 17 (1891) (emphasis added).

On the floor of the Senate a specific amendment even extending this provision for 60 days was proposed by Senator Pettigrew and incorporated into the final act:

> Mr. PETTIGREW. . . .Further than that, as I am informed, under the existing laws these Indians can take selection in severalty upon the land ceded in this treaty; in my amendment, as I said before, simply extends that time for 60 days *after* this bill becomes a law. 22 Cong. Rec. 3549 (1891) (emphasis added).

Petitioner would submit Congress was not concerned with the fact that the members of the whole of the Sisseton-Wahpeton tribe would soon be situated on allotments in the midst of the public domain any more than it was concerned with the fact that some of the members of the Crow tribe would soon be so situated. The salient effect, if not the purpose of, both agreements was the same – *the acquisition of surplus Indian lands to be restored to the public domain for the purpose of providing homes to actual settlers.* This was the case in the pure cession agreement of the Crow tribe and it was still the case in the cession agreement of the Sisseton-Wahpeton

tribe – irrespective of the fact that it had been tailored to the Dawes Act. If the allotment provision of the 1887 Dawes Act in the Sisseton-Wahpeton agreement seems inconsistent with the restoration of the remainder of the Lake Traverse Reservation to the public domain, this inconsistency certainly cannot be substantiated by a comparison with the allotments left on the public domain in the Crow situation.

2. Additional Comparison And Support.

There is further support for the position of Petitioner that the Sisseton-Wahpeton agreement was intended to have the same effect on the status of the Lake Traverse Reservation as the Crow agreement undeniably had on that portion of the Crow Reservation

(a) Homestead amendment.

The Sisseton-Wahpeton agreement was amended by Congress so that the lands thereby acquired by the United States would be subject only "to entry and settlement under the homestead and townsite laws of the United States. . ." Crow Act of March 3, 1891 §30, 26 Stat. 1039 (1891). The Crow agreement was similarly amended to provide that whenever by operation of law or the Proclamation of the President the lands were to be "opened to settlement" that they be disposed of ". . .to actual settlers only, under the provisions of the homestead laws. . . ." Crow Act of March 3, 1891 §34, 26 Stat. 1043 (1891).

There is no more reason to assume that Congress intended for the settlers in South Dakota to be settling "within the boundaries" of a reservation any more than it could have intended that the settlers in Montana be so situated. For this situation to exist would seem even more incredulous when one considers that these were the *same* Senators and Congressmen.

considering, commenting on, and similarly amending both agreements at the *same* time, incorporating both agreements into the *same* bill, and passing that bill the *same* day—*without ever mentioning* on the floor or in the reports that the settlers in one state would be then on the public domain outside the boundaries of a reservation, while the settlers in the other state would still be situated inside the boundaries of the reservation on something less than the public domain, to say the least. This is especially so, in light of the statements in the *Congressional Record* and other documents that, in this respect, all the agreements were to have the same effect.

(b) Terminology.

In both instances, the United States Government, through a duly authorized commission, negotiated and obtained a cession of land to the United States Government from the members of the respective tribes. Although the operative language of the Crow Act contained only the "sell and dispose" terminology, while the Sisseton-Wahpeton agreement contained the stronger "cede, sell, relinguish and convey to the United States all their claim, right, title, and interest in and to" terminology, numerous references in both Acts refer to the basic transaction as one and the same:

> . . . in consideration of the *cession* . . . portions of the reservation to be herein *ceded* . . . this *cession* of lands . . . said *ceded* portion . . . *cession* of lands . . . lands *ceded* . . . territory by said agreement *ceded* . . . *within the limits of the ceded* portion . . . Crow Act of March 3, 1891 §§31, 33, 34, 26 Stat. 1039-1042, 1043 (1891) (emphasis added).

> . . . lands *ceded* . . . agreement *ceded* . . . the *cession*, sale, relinguishment . . . lands by said agreement *ceded* . . . lands by said agreement *ceded* . . . lands by said agreement *ceded* . . . Sisseton-Wahpeton Act of March 3, 1891 §§26, 27, 28, 30, 26 Stat. 1035-1039 (1891) (emphasis added).

Similarly, the Crow Act also contained the same "open to settlement" terminology, Crow Act of March 3, 1891 §§33, 34, 35, 26 Stat. 1042, 1043 (1891), and both Acts also variously referred to the transaction as a "sale" or a "disposal."

More importantly, both of the cessions were to the United States Government in return for a *sum certain*. The only difference was that pursuant to the Crow Act most of the money was to be spent on projects with the remainder distributed per capita, while pursuant to the Sisseton-Wahpeton agreement, because of the Dawes Act, the money was to be deposited in the Treasury to the credit of the tribe. Certainly Congress did not think this a significant distinction.

The fact that the Sisseton-Wahpeton Act was a cession agreement between the United States Government and the members of the Sisseton-Wahpeton Tribe for a sum certain was evidently overlooked and miscontrued in the opinion of the court below.[17]

(c) Congress and the Office of Indian Affairs.

The fact the members of Congress and individuals in the various agencies of the United States Government all attributed a similar "effect" to both the Sisseton-Wahpeton and Crow agreements would seem to Petitioner to also strongly support the position that both agreements were intended to similarly disestablish and restore to the public domain those portions of the reservations respectively affected. Although certain aspects of this phase of the Sisseton-Wahpeton-Crow comparison have been discussed elsewhere, they will of necessity have to be discussed briefly at this point.

Primarily, Petitioner is referring to the fact that from the

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17. See the discussion of the opinion of the court below, *infra*, at 78-83.

moment the agreements were tacked onto the Indian Appropriation Bill until they received final passage, each and every member of Congress consistently attributed the same basic and fundamental effect to both the Sisseton-Wahpeton and Crow agreements. *See* the extended discussion set forth at 48-56 *supra*. Of course the most succinct passage in the *Congressional Record* confirming this position was that of Senator Dawes, already referred to several times:

> Mr. DAWES. Mr. President, the bill on its face, as nearly as it can be ascertained (there being some indefinite appropriations connected with it), is almost $16,000,000. The Indian appropriation bill proper contains about $7,200,000. *The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the surrender of a large portion of their reservations to the public domain.* In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. *All this land is opened by this bill to settlement as part of the public domain* upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation ., which is open to settlement at $2.50 an acre, because the United States gave the Indians for the surrender of $2.50 per acre. 22 Cong. Rec. 3879 (1891) (emphasis added).

Petitioner has also previously alluded to the fact that this last gentlemen was perhaps the most singularly influential and knowledgeable Senator ever to participate in Indian Affairs. Indeed, he authored the very legislation that provided for the Sisseton-Wahpeton negotiations and set the format for the provisions of the agreement – the Dawes Act of 1887. As a matter of fact, the whole Senate relied on him to compile and put all of these same agreements in a form acceptable to the Senate. As the *Congressional Record* indicates, Senator Dawes was intensely familiar with not only the Sisseton-Wahpeton and

Crow Agreements, but also each of the other agreements:

> Mr. GORMAN. . . . I have no doubt the Senator has investigated and the members of the Indian Committee have investigated to the very best of their ability in the time they have had to work, far into the night, to try to get the bill into shape. . . . 22 Cong. Rec. 3454 (1891).
> Mr. CALL. . . . I believe the provisions which the Senator from Massachusetts [Mr. DAWES], to whom the bill was referred, has placed upon it are wise and are as good probably as could result from a more prolonged consideration of the bill and discussion of it in the Senate. . . .I wish to say, Mr. President, that so far as the subcommittee was concerned, and so far as the Senator from Massachusetts [Mr. DAWES] is concerned, who did the principal labor in the examination of these provisions of the bill, of these agreements, and of all the portions of the bill which are provided for carrying them into effect, they gave to the consideration of these provisions all the time that was possible to have been given to them since the bill was reported to the Senate and referred to them. . . . .22 Cong. Rec. 3455, 3456 (1891).
> Mr. GORMAN. . . . No member of the Committee on Appropriations, so far as I know, other than the Senator from Massachusetts, who is the chairman of the Committee on Indian Affairs and who had considered nearly all of these questions in separate bills, can tell the Senate what is contained in the proposition. Of course we know that if these treaties are ratified we must appropriate $6,000,000 and make provision for the disposition of from three to five or six million acres of the public domain; but it is done in such a way that I cannot explain it to the Senator. . . [B]ut for the familiarity of the distinguished Senator from Massachusetts with this subject, you would have had a bill to consider that would simply have been an outrage, one which would have meant nothing, and it was only after nights of labor by him as a subcommittee that it was placed in the shape in which it now is. . . . I have watched him during the day and night as he has tried to perfect this measure. Great credit is due him, and I for

one absolve him from any criticism hereafter .... 22 Cong. Rec. 3527, 3880 (1891).

As this Court has stated, "... it is the sponsors that we look to when the meaning of the statutory words is in doubt ..." *N.L.R.B.* v. *Fruit and Vegetable Packers*, 377 U.S. 58, 66 (1964). In this respect, Senator Dawes' role emerges as not only the sponsor of the Dawes Act of 1887, but also the sponsor, for all intents and purposes, of the agreements in their final form in the Act of March 3, 1891. Petitioner would submit that to assume a Senator in this position erroneously construed this fundamental aspect of the agreements would effectively negate the portion of the *Mattz* decision which established that a congressional determination to disestablish or terminate could be made clear from the "... surrounding circumstances and legislative history...." *Mattz*, *supra*, at . This is especially so in light of the fact that the other members of Congress not only concurred in his analysis but also expressed similar views. Congress had spoken, and although the measure was a "procedural monster," Mr. Call put the issue in proper perspective immediately before passage:

> Mr. CALL. ... Whatever just complaint there might be for bringing into the Senate at so late a period a bill with so many items upon it and with these agreements, *there is nothing in this bill that is not in accordance with existing law*. These agreements have all been ratified and acted upon by both branches of Congress, Senate and House of Representatives, with the exception of two, and those have undergone the most deliberate and searching examination and argument in the Senate, and by decided majorities have been put upon the bill. So the criticism is in these respects unfounded.
>
> All the provisions in this bill relating to the *settlement of the public lands are but the application of the existing law in regard to such settlement*...

> The appropriations made in the bill for the *release* of the Indian claim of right to this land is in accordance with the *established policy of the Government* and has been demanded by a large majority of both Houses of Congress. The amount is reimbursed, so that it is but a nominal appropriation. The entire amount comes back into the Treasury. It is nothing but a loan or the public credit of the United States to the accomplishment of these purposes and in no respect touches the taxation upon the people of this country.
> objection found to this bill which has no just foundation. *All the legislation to the bill is but the application of the existing law upon the subject.*
>
> That is the condition of this bill. That it came here too late for it to have had prolonged examination in reference to all these items, and that every Senator could not fully comprehend them, is true; and that is all the criticism that can be made upon it.... 22 Cong. Rec. 3880-3881 (1891).

Finally, Petitioner has been unable to find anything in the entire legislative history of the Indian Appropriation Bill that can fairly be said to support an opposite conclusion. Even the miscellaneous documents introduced in the *Congressional Record* for debate on other issues raised by the Indian Appropriation Bill attribute this same fundamental effect to the actions of Congress in this respect. For example, on February 14, 1891, Congressman McCord, during a debate on Indian education, quoted from what he termed "a pamphlet on Indian Education, by General Thomas J. Morgan, the present able, intelligent, and efficient Commissioner of Indian Affairs." 22 Cong. Rec. 2699 (1891). One of the paragraphs therein stated:

> The second great economical fact is that the lands known as Indian reservations now set apart by the Government for Indian occupancy aggregate nearly 190,000 square miles. This land for the most part is uncultivated and unproductive. When the Indians shall

> have been properly educated, they will utilize a sufficient quantity of these lands for their own support and will *release the remainder, that it may be restored to the public domain* to become the foundation for innumerable happy homes; and thus will be added to the national wealth immense tracts of farming and grazing land and vast mineral resources, which will repay the nation more than one hundred fold for the amount which it is proposed shall be expended in Indian education. 22 Cong. Rec. 2700-2701 (1891) (emphasis added).

This was the "established policy" of the Government.

Petitioner would submit that one could not expcet a more unequivocal and probative illustration of the precise effect that the ratification of the agreements had on the Crow and Lake Traverse Reservations than the following excerpt from the 1891 Commissioner of Indian Affairs Annual Report to the Secretary of the Interior:

REDUCTION OF RESERVATIONS

> The work of *reducing the area* of the reservations, by extinguishing by purchase from the Indians their title to the land and its *restoration to the public domain*, has been carried forward rapidly, as is shown in the following detailed statements: . . . The ratification of agreements by the act of March 3, 1891 (26 Stats., 989), *restored to the public domain. . .from the Lake Traverse Reservation, South Dakota, about 660,000 acres, and from the Crow Reservation, Montana, about 1,800,000 acres*, a total of about 8,164,765 acres. . . .
>
> The ceded portion of the Fort Berthhold Reservation, North Dakota, consisting of about 1, 600,000 acres, has been thrown open to settlement by proclamation of the President.
>
> The ceded lands of the Coeur d'Alene Reservation, Idaho, were open to settlement from the date of the approval of the act.

> Allotments of land are being made on the Lake Traverse Reservation, South Dakota, and the Cheyenne and Arapaho Reservation, Oklahoma, and surveys are in progress on the Crow Reservation, Montana, and when they are completed and the terms of the Act ratifying the respective agreements with the Indians of the several reservations shall have been fully complied with, the unallotted or vacant land embraced within *the ceded portions will be thrown open to settlement*. Report of the Commissioner of Indian Affairs, 44, 45 (1891) (emphasis added).

Again, instead of treating the Sisseton-Wahpeton Act as an exception to the generally prevalent policy of the period, the Commissioner of Indian Affairs makes no distinction whatsoever between the Sisseton–Wahpeton agreement, which was tailored to the Dawes Act, and the Crow cession, which was not.

The Lake Traverse Reservation was equally subject to the general prefatory remarks of reducing the area of the reservation and restoring them to the public domain as was the Crow. Both were specifically stated to have restored so many thousands of acres to the *public domain* and both were soon to be "thrown open to settlement." Report of the Commissioner of Indian Affairs, 44 (1891).

In fact, Petitioner has been unable to substantiate that the Commissioner of Indian Affairs even considered that homesteaders on the six hundred and sixty thousand acres of land in South Dakota would be in a class separate and distinct from the homesteaders on the one million eight hundred thousand acres of land in Montana. Certainly such a conclusion could not be supported by the Commissioner's very general remarks on the very next page of his Annual Report:

RESERVATIONS SHOULD NOT BE REDUCED TOO RAPIDLY

> While perhaps it is possible to push such work too rapidly, I do not hesitate to say that *the ultimate destruction of the entire system of reservations* is inevitable. There is no place for it in our present condition of life, and it must go. *The millions of acres of Indian lands now lying absolutely unused are needed as homes for our rapidly increasing population and must be so utilized. Whatever right and title the Indians have in them is subject to and must yield to the demands of civilization.* Report of the Commissioner of Indian Affairs, 46 (1891) (emphasis added).

Nor would the fact that, after the openings, both the portion of the Crow Reservation and the whole of the Lake Traverse Reservation were similarly removed from the Office of Indian Affairs' published Map and Schedule showing the Reservations and Reservation areas in the United States, respectively lend any credence to such a distinction. Only in light of the above information can one really appreciate the significance of the following exchange:

> Mr. HAWLEY. I should like to ask the Senator for information, what is the opinion of the Secretary of the Interior and the Commissioner of Indian Affairs upon this bill, whether it is satisfactory to them.
> Mr. GORMAN. The Senator from Massachusetts can answer that question.
> Mr. DAWES. I never knew an appropriation bill satisfactory to a Department, but I think this bill is as nearly satisfactory to the Interior Department as the lot of humanity will permit.
> Mr. HAWLEY. I do not ask whether it is satisfactory as to amounts, but whether they believe in the purposes and principles and measures of the bill.
> Mr. DAWES. *The Interior Department is strongly in favor of the bill in its present shape.* 22 Cong. Rec. 3880 (1891) (emphasis added).

D. THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES OF THE PURE CESSION AGREEMENTS, RATIFIED BY CONGRESS ON THE SAME DAY, IN THE SAME BILL AS THE SISSETON-WAHPETON AGREEMENT, SERVE TO PUT THE ISSUE IN A PROPER HISTORICAL PERSPECTIVE.

As Petitioner stated in the preface to the Sisseton-Wahpeton-Crow section, an allocation of time and resources did not permit any extended discussion or research into the history of each of the separate agreements ratified by the Act of March 3, 1891. Therefore, the Crow agreement was selected for the purpose of a more detailed comparison and discussion to support the position of Petitioner by putting the issue to be decided herein in its proper historical perspective. This selection should not be construed to indicate that an examination of thelegislative history and surrounding circumstances of the other agreements would have distorted this perspective in any way.

On the contrary, the Fort Berthhold agreement, for example, is on "all fours" with respect to the partial effect of the Crow agreement discussed *supra*, in addition to containing the identical operative "cede, sell, and relinquish to the United States all their right, title, and interest in and to" language of the Sisseton-Wahpeton agreement! Sisseton–Wahpeton Act of March 3, 1891 §23, 26 Stat. 1032 (1891). This is especially interesting in light of the preface to the Fort Berthold agreement:

> Witnesseth that whereas it is the *policy of the Government to reduce to proper size existing reservations* when entirely out of proportion to the number of Indians existing thereon, with the consent of the Indians, and upon just and fair terms; and whereas the Indians of the several tribes, parties hereto, have

> vastly more *land* in their present reservation than they need or will ever make use of, and are desirous of disposing of a portion thereof in order to obtain the means necessary to enable them to become wholly self-supporting by the cultivation of the soil and other pursuits of husbandry... Sisseton-Wahpeton Act of March 3, 1891 §23, 26 Stat. 1032 (1891) (emphasis added).

There is certainly no doubt that the 1891 Fort Berthold Act effectively disestablished approximately one half of the Fort Berthold Reservation. As recently as 1972, the Eighth Circuit Court of Appeals confirmed this in *City of New Town v. United States*, 454 F.2d 121 (C.A. 8 1972), in which neither the court nor the parties even questioned the status of the 1891 boundary.

Furthermore, even a cursory examination of the Fort Berthold legislative history throws considerable light on some of the reasons for not extending the Dawes Act of 1887 to each and every reservation. For example, when the Commissioner of Indian Affairs wrote the Secretary of Interior requesting that the residents of the Fort Berthold Reservation should not be made to await the "slower process" of the general allotment act he stated:

> Agent Gifford states that the Indians are looking for the ratification of the agreement with great anxiety and no little impatience, and that he finds it difficult to satisfy them with any explanation as to the cause of the delay. He says they are ready to take their lands in severalty as provided in the agreement, and that it would be an act of great injustice to them to compel them to await the slower process of the general allotment act to obtain the much-needed means to establish themselves in individual homes through the sale of their surplus lands. . . .
>
> In keeping with the policy of the Government, it provides for the allotment of lands in severalty to the Indians in quantity, and with a similar restriction regarding alienation, as is provided in the severalty act, except that it does not authorize the President to extend the non-alienation period beyond the twenty-five years specified.
>
> In all human probability it would be several years (two or three at least) before the Indians would derive any financial aid from the sale of their surplus lands if the general allotment act were applied in their case, but under the terms of the late agrement the money consideration would be forthcoming at once, and could be expended in assisting them in beginning life on their individual allotments. . .
>
> Furthermore, by the terms of this agreement a tract of land estimated to contain one million six hundred thousand acres is made available to white settlement. This also is an important consideration. . . .
>
> As there is no provision in the agreement for subdividing the diminished reservation for allotment, the cost of the surveys will have to be borne by the Government; but this is a very small matter, considering the mutual benefits to be derived from the vast cession of landsmade to the Government. The item to be inserted in the bill makes provision for the required surveys. Letter from Commissioner of Indian Affairs to Secretary of Interior, January 13, 1888, H.R. Rep. No. 82, 51st Cong., 1st Sess. 2, 3 (1890).

Therefore, because of this overlap, Petitioner would submit that the legislative history of each of the other agreements could be utilized by this Court to establish what precise principles of the cession era Congress intended to retain by tailoring certain cession agreements to conform with the provisions of the Dawes Act of 1887. Because the agreements ratified by the Act of March 3, 1891, were concluded both before and after the Dawes Act and the final debates were not until 1891, four years after theDawes Act had been in effect, all of these documents should contain material that could be very useful to this Court in deciding the issue in the instant case.

In this respect, Petitioner would most certainly be pleased to assist this Court at any time by filing a supplementary brief containing the legislative history and surrounding circumstances of each of the other agreements that were ratified by Congress in the Act of March 3, 1891, if this Court so desired. As Petitioner stated in the Petition for Writ of Certiorari, the importance of the issue which is presented herein is beyond question, and someone, somewhere,musttake the necessary time and action to authoritatively ascertain the intent of Congress at the turn of the century. Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, *United States ex rel. Feather v. Erickson* (1973) (hereinafter cited as Pet.)

II.

NEITHER THE OPINION OF THE COURT BELOW NOR THE RATIONALE OF SEYMOUR AND MATTZ IS CONTROLLING IN THE RESOLUTION OF THE STATUS OF THE LAKE TRAVERSE RESERVATION

A. THE OPINION OF THE COURT BELOW IS CLEARLY ERRONEOUS.

1. The Distinction.

Evidently the court below could not, ". . .against the glare of *Seymour* and the more recent judicial guidance in *Mattz, Condon* and *New Town* . . ." distinguish between the situations therein and the outright sale to the Government presentedin the instant case. Pet. App. A 8a-9a. Contrary to the plain language of the Act of March 3, 1891, the court nevertheless stated:

> Just as in the before mentioned three cases, the reservation here was *not* sold to the government outright but merely opened for settlement under the homestead laws and the 1887 general allotment plan. Pet. App. A 6a (emphasis added).

Petitioner would submit that this failure of the court below to recognize this fundamental distinction resulted in a decision which is clearly erroneous on its face and the attempt of the United States as *amicus curiae* to reconcile the conflict in its memorandum merely adds fuel to the fire. [18]

> Both forms of statute, with some variations in wording, were repeatedly used in opening reservations under the General Allotment Act. The earlier statutes tended to be written in terms of sale of unalloted land to the government for homestead purposes, while the later statutes often spoke of ceding unallotted land in trust to the government for homestead purposes.[3] Memorandum of United States as Amicus Curiae No. 73-1148. *DeCoteau v. District County Court for Tenth Judicial District*, 6 (1974).

All three of these statutes the United States cites in Note 3 in the above quotation as examples of one of ". . .only two of the techniques employed by the government to allow homesteading *within* Indian reservations. . ." *disestablished* portions of the reservations unequivocally and forever. Memorandum of United States as Amicus Curiae No. 73-1148, N.3 at 6,*DeCoteau v. District County Court for Tenth Judicial District* (1974) (emphasis as in original). How these three can then be ". . .*contrasted* with statutes terminating reservations, or changing or diminishing their boundaries,–" is beyond the comprehension of Petitioner! Memorandum of United States as

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18. Although the cited Memorandum for the United States as Amicus Curiae was submitted in the sister case of *DeCoteau v. District Court*, 211 N.W. 2d 843 (S.D. 1973), the United States therein addressed itself to the identical issue of the effect of the Act of March 3, 1891 on the boundaries of the Lake Traverse Reservation.

Amicus Curiae No. 73-1148, N.3 at 6, *DeCoteau v. District County Court for Tenth Judicial District* (1974) (emphasis added). In effect the United States has thereby not only strongly supported the position of Petitioner and cast considerable doubt on the validity of the decision below, but also essentially undermined the crux of its own argument.

In this light the 1963 position of the United States Attorney for South Dakota, with ". . .express approval of the Department of Justice at Washington, D. C., --" that this *same* act disestablished this *same* reservation would appear somewhat more persuasive. *DeMarrias v. State of South Dakota*, 319 F.2d 845, 847 (C.A. 8 1963), *aff'g* 206 F. Supp. 549 (D.S.D. 1962) (emphasis added).

2. The Glare Of Precedence.

The failure of the court below to even recognize a cession to the United States for a sum certain also exemplifies the criticism Petitioner has directed at the "recent decisions" of the Eighth Circuit Court of Appeals: namely, decisions in which a preoccupation with the "glare" of precedence and conformity of holdings has led to some rather te: uous results.

For example, in *City of New Town v. United States*, 454 F.2d 121 (C.A. 8 1972), the court was presented with the question of what effect, if any, a 1910 act opening a portion of the Fort Berthold Reservation had on the 1891 boundaries of that reservation. The court held that the 1891 boundaries were not affected and concluded that:

> . . .the boundaries of the Fort Berthold Reservation are those specified in the Act of March 3, 1891, 26 Stat. 1032, and that the Act of June 1, 1910, 36 Stat. 455 and subsequent Acts did not alter those boundaries.

City of New Town, supra at 127.

One year later, the court applied the rationale of *New Town, supra*, to a South Dakota reservation and held that the Cheyenne River Reservation was not diminished even though the legislation being construed therein referred *on its face* to the area unaffected by the act remaining as ". . .the diminished reservation. . .". *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (C.A. 8 1973). The court termed the decision a "close question" and concluded that " diminished reservation" didn't really mean diminished reservation boundaries! *United States ex rel. Condon v. Erickson*,478 F.2d 687, 688 (C.A. 8 1973).

In the decision below the court cited *New Town* and *Condon* incessantly and held that the Act of March 3, 1891, had no affect on the boundaries of the Lake Traverse Reservation.

Petitioner finds it very interesting that the 1891 Act the court cited as establishing the boundaries of the Fort Berthold Reservation in *New Town, supra*, did so by disestablishing approximately one half of what had previously been the Fort Berthold Reservation, while the 1891 Act in the instant case had no affect on the boundaries of the Lake Traverse Reservation– interesting in that both acts were passed by the *same* Congress, in the *same* bill, on the *same* day!

In the absence of some rational explanation for what would *ipso facto* appear to be an irrational congressional mind, this situation should certainly have raised some questions. Yet the opinion of the court below is silent on the point. Had the court even realized the full import of the conflict it is doubtful that the Sisseton-Wahpeton agreement would have been treated as exemplifying the rule, rather than the exception. This is

especially so in light of a statement in the *Amicus* brief of the American Association of Indian Affairs submitted to the court below on behalf of the Sisseton-Wahpeton tribe wherein the unusual treatment allegedly accorded the Sisseton-Wahpeton agreement really manifests itself for the first time.

> Significantly, of the seven reservations opened by the Act of March 3, 1891,[7] the portion of land excluded from the reservation and the new boundaries resulting therefrom are specifically delineated by definite property lines for all but Lake Traverse.[8] Brief for the Association on American Indian Affairs, Inc., and the Sisseton-Wahpeton Sioux Tribe as Amicus Curiae at 10-11, *United States ex rel. Feather v. Erickson*, 489 F.2d 99 (C.A. 8 1973).

Although the revelation was made to support the position of the tribe(??) in an indirect manner surely the Sisseton-Wahpeton agreement should no longer have been viewed as a typical homesteading statute – the only one of seven statutes passed on the same day, in the same bill, by the same Congress, which did not diminish or extinguish reservations.[19] Indeed, this same preoccupation with generalizations should have led the court below to the opposite conclusion – especially if it had carefully examined the congressional materials set forth in Part I, *supra*.

3. The Absence Of Proposed Boundaries.

If Petitioner's position is correct with respect to the analogy

19. Petitioner has stated, *supra*, that as of this date, it has not conclusively established the *effect* of each and every agreement ratified by the Act of March 3, 1891, 26 Stat. 1016 (1891). In this respect, and for purposes of *this* paragraph, it is relying on the statement of the Amicus in the court below. Brief for the Association on American Indian Affairs, Inc., and the Sisseton-Wahpeton Sioux Tribe as Amicus Curiae, *United States ex rel. Feather v. Erickson*, 489 F 2d 99 (C.A.8 1973).

of the partial Crow opening set forth in Part I, *supra* at 52-74, the Lake Traverse Reservation would have been effectively disestablished by the passage of the Act of March 3, 1891, opening the reservation to settlement – irrespective of the fact that the Sisseton-Wahpeton agreement had been tailored to the Dawes Act. After the opening the allotments therein would be situated on the public domain in the same manner as the Crow situation.

Similarly, just as there were no remaining boundaries encompassing the ceded or disestablished area in the Crow situation, there would be no remaining boundaries encompassing the ceded or disestablished area of the Lake Traverse Reservation. In the Crow situation this very fact *necessitated* a new or proposed boundary separating the ceded area from the newly diminished reservation. In the Lake Traverse situation the same fact would *necessitate* that there be no new or proposed boundaries to even discuss for there would be no diminished reservation that would remain.[20]

Even the opinion of the court below substantiates this conclusion and hence the position of Petitioner:

> Nothing that can be gleaned from the legislative history or subsequent legislative enactments can be fairly said to shed any further light upon the intent of the Congress regarding the *reservation boundaries*. The Committee reports on the 1891 Act[6] and reports on similar bills that were not enacted[7] *do not discuss the proposed boundaries*. . .
>
> We must view as significant the fact that our search of the legislative documents subsequent to the 1891 Act

20. But for the large number of allotments in the Lake Traverse Reservation, a description of each would probably have been noted when the boundaries were disestablished.

> unearths no teltale language as to the law maker's will concerning the *boundaries* of the Lake Traverse reservation. The significance lies, of course, in the test to be applied. That is, congressional expression or clear implication diminishing the reservation boundaries. Pet. App. A 7a, 8a (emphasis added).

In its proper historical perspective (i.e., in light of the congressional intent clearly evidenced inthe Crow situation and others passed the same day) this fact alone should have led the court below to an opposite conclusion. Instead, the court completely misconstrued its significance and stressed in the opinion below that the lack of proposed boundary discussion indicated the continued existence of the Lake Traverse Reservation.

4. Prior Judicial Interpretation.

Those sections of the Act of March 3, 1891, that ratified the Sisseton-Wahpeton agreement have had a long prior history of judicial interpretation, none of which is consistent with the conclusion reached by the court below.

In 1958 the South Dakota Supreme Court, in *Application of DeMarrias for Writ of Habeas Corpus*, 77 S.D. 294, 91 N. W. 2d 480 (1958), held that, by virtue of the ratification of the 1889 agreement, the Sisseton-Wahpeton Indians ceded the lands to the United States, and that the lands were thereby restored to the public domain.

Although the court found the Lake Traverse Reservation, as such, to be effectively disestablished, it specifically noted that it found nothing contained in the 1889 agreement indicating an intention to dissolve the tribal government.[21] The court stated:

21. Discussed *infra*, at 101-102.

> In fact, the tribal organization is still existing. Their Tribal Constitution was approved by the Commissioner of Indian Affairs on October 16, 1946. Article I recognizes the limited extent of their jurisdiction in the following language: "The jurisdiction of the Sisseton-Wahpeton Sioux Tribe shall extend to *all Indian-owned lands* lying in the territory within the *original* confines of the Sisseton-Wahpeton Lake Traverse Sioux Reservation." *Application of De Marrias for Writ of Habeas Corpus*, 77 S. D. 301, 91 N.W. 2d 484 (1958) (emphasis added).

If the Lake Traverse Reservation had never been disestablished the emphasized terminology as set forth above would have been superfluous in light of the then existing state and federal case law rejecting "checkerboard jurisdiction" *within* the boundaries of reservations. *See*, 93-100, *infra*.

In *State v. DeMarrias*, 79 S.D. 1, 107 N.W.2d 255 (1961), *cert. den.* 368 U.S. 844 (1961), theSouth Dakota Supreme Court reaffirmed its earlier decision in another case involving the same defendant and the same reservation wherein a similar issue was raised.

Habeas corpus proceedings were then commenced in the United States District Court for the District of South Dakota, Northern Division, but the Court denied the writ. *DeMarrias v. State of South Dakota*, 206 F. Supp. 549 (D.S.D. 1962). Significantly, the opinion cited and distinguished the then recent decision of this Court, *Seymour v. Superintendent* ,368 U.S. 351 (1962), and appeal was taken.

The Eighth Circuit Court of Appeals affirmed upon the basis of the trial court's "well reasoned" and "carefully considered opinion." *DeMarrias v. State of South Dakota*, 319 F.2d 845, at 847,846 (C.A. 8 1963). Significantly, the opinion noted that the trial court had more than adequately distinguished *Seymour, supra*.

Each of the foregoing opinions was soundly based upon a careful reading of the Act of March 3, 1891. In addition, the Federal District Court engaged in an in depth analysis of the special state and federal statutes that were in force concerning the South Dakota reservations after the turn of the century. *De Marrias v. State of South Dakota*, 206 F. Supp. 549, at 550, 551 (D.S.D. 1962). Yet the court below, for reasons that were to become evident in the course of its opinion, overruled the *De Marrias* decisions. Admittedly, none of the *De Marrias* decisions analyzed the legislative history as this Court did in *Mattz v. Arnett*, 412 U.S. 481 (1973), but neither did the court below.

In addition to the above cases, the only other major decision involving the original Lake Traverse Reservation was *United States v. Rickert*, 188 U.S. 432 (1903), which was not cited in any of the opinions, but nevertheless must be mentioned. In *Rickert* this Court held that the county of Roberts, South Dakota, could not collect taxes on certain improvements on, and personal property used in the cultivation of, land in that county occupied by members of the Sisseton band of Sioux Indians. The crux of the decision centered around the fact that the occupants were still wards of the United States. In this respect the decision probably cannot be said to shed any signifcant light on the issue presented herein.

However, Petitioner would submit that a close reading of the opinion reveals that in 1903 the land so allotted was not then considered to be within the boundaries of any reservation. Time and time again the land so situated was referred to as simply "county of Roberts, South Dakota." *United States v. Rickert*, 188 U.S. 432 (1903). In fact the only specific reference in the *present* tense in the opinion to the reservation was:

> . . .that the said Indians are holding, and for several years last past have held, allotted lands inthat county, and within the *former* Sisseton Indian Reservation. . . *United States v. Rickert, supra* (1903) (emphasis added).

Although the "former" reference, by itself, is of negligible probative value, when read in context with the tenor of the remainder of the opinion it nevertheless reflects the status of the Lake Traverse Reservation in this Court's mind in 1903.

5. Additional Materials.

If the opinion of the court below does not accurately reflect the intent of Congress in 1891, Petitioner is, to a large extent, responsible. The judicial system is founded upon and functions best as an adversary proceeding, and Petitioner simply has not recently lived up to its responsibility in this respect. Domestic difficulties within the State of South Dakota over the past two years have resulted in a burden on the staff and resources of Petitioner, the result of which was simply that Petitioner had not been able to adequately present the position of the State in the recent cases, and our brief below was, unfortunately, no exception.

In the court below Respondent submitted a cogent argument asking the court to depart from its 1963 position in light of certain recent decisions. Petitioner relied exclusively on the 1963 position of the court presented in a similarly cogent three page argument. When the Association on American Indian Affairs, Inc., as *amicus curiae*, submitted it's excellent 50 page brief with over 140 citations to legislative history, Land Decisions and Archives materials, Petitioner simply did not respond for the reasons set forth above.

This is the reason for the statement in the Petition for Writ

of Certiorari that since the decision below, the State has devoted considerably more time and effort to research that had not been presented to the court below. Petitioner has not, as Respondent has alleged, asked anyone to "buy a pig in a poke." Respondent's Brief in Opposition to Writ of Certiorari, at 5, *United States ex rel. Feather v. Erickson*, (1973).

Similarly, with respect to Respondent's position that this "new material cannot properly be presented before this Court," Petitioner would only state that it is somewhat disturbed to think that anyone would want this Court to resolve an issue of congressional intent with any limitations imposed other than what this Court would impose upon itself.

The concurrence of Petitioner that certiorari be granted in Memorandum for Respondent's Concurrence that Certiorari Be Granted, No. 73-1148 at 8, *DeCoteau v. District County Court*, was founded upon the belief that this Court should authoritatively resolve the issue presented. If Petitioner can render any assistance that the Court might deem helpful in this respect, it would be more than willing to assume that responsibility. Consistent with this position, a stipulation has been filed in the Office of the Clerk to the effect that Petitioner will not resist any responsible party who might request this Court's permission to enter an appearance as *amicus curiae*.

B. THE RATIONALE OF *SEYMOUR* AND *MATTZ* DOES NOT REFLECT THE STATUS OF THE SISSETON-WAHPETON "CEDE, SELL, RELINQUISH" ACT OF MARCH 3, 1891.

Part I of this brief was devoted to an examination of the legislative history of pure cession agreements and the one in the instant case tailored to the Dawes Act of 1887. Petitioner has taken theposition that the effect upon a reservation or a portion

thereof with respect to the issue presented herein was one and the same; in both instances the reservation or a portion thereof was effectively disestablished and restored to the public domain.

Although the Sisseton-Wahpeton agreement was tailored to the Dawes Act of 1887, it was still of the sum certain variety, a cession to the United States with only the *proceeds* of the sale deposited "in trust" to the credit of the members of the Sisseton-Wahpeton Tribe. In this respect the operative language and arrangement in the Sisseton-Wahpeton agreement and the 1891 Act are technically a world apart from the operative language and peculiar "trust" arrangement of the 1906 Colville Act construed in *Seymour v. Superintendent*, 368 U.S. 351 (1962).

The exact and precise precusor of the 1906 Colville Act actually emanated from the congressional mind between 1901 and 1903. The Act of April 23, 1904, opening a portion of the Rosebud Reservation in South Dakota, was the first concrete manifestation of this type of complete "trust" arrangement. Act of April 23, 1904, 33 Stat. 254 (1904). Significantly, an examination of the legislative history of this and two later Rosebud acts indicates that a strong argument could be made that Congress did not intend to change the necessary effect of the earlier pure cessionpolicy, even up to and through 1910.

Thus, one would have a continuity in policy from the time of the pure cession agreements through the modified Sisseton-Wahpeton agreements up and to the trust statutes of the early 1900's. In the absence of some specific congressional intent to the contrary, this continuity of policy would unfold as a series of reservations disestablished or at least diminished by special acts of Congress " opening them to settlement." To the

extent this Court might deem the rationale of either *Seymour* or *Mattz* controlling inthe instant case, Petitioner will therefore proceed in the alternative: 1. The rationale of *Seymour* and *Mattz* does not square with the explicit congressional intent evidenced by more than 25 years of legislative history and related documents of the Office of Indian Affairs and should therefore be departed from. 2. Or in the alternative, that this Court in both *Seymour* and *Mattz* was involved in the construction of acts sufficiently distinguishable from the Sisseton-Wahpeton type of arrangement to limit the holdings to the facts presented therein.

At first glance such an alternative agrument might seem unwarranted in light of the position that each case must be determined upon its own facts and legislative history, especially in view of the understandable and meritorious position that this Court would be reluctant to decide issues of a generalized nature. However, as evidenced by some of the general pronouncements in *Mattz* as to the effect of all 1887 Dawes surplus land statutes "opening" reservations to settlement, for all intents and purposes, the instant case could effectively resolve, because of or incombination with *Seymour* and *Mattz*, the status of each and every "opening" subsequent to 1887. Petitioner would submit that for this Court to rely solely on the rationale of *Seymour* and *Mattz* and limit again its perspective to one statute and a particular reservation could result in a holding that would effectively negate the crux of nearly three decades of legislation intended by Congress to restore to the public domain over 50,000,000 acres of land previously held within the boundaries of Indian reservations.

1. Persuasive Evidence of Continuity, If Necessary.

The conflicts and confusions within the Eighth Circuit and between the Eighth Circuit Court of Appeals and the South Dakota Supreme Court resulted in an extensive review of

legislative history by the parties and the court in *Rosebud Sioux Tribe v. Kneip*, No. Civ. 72-4055 (D.S.D. filed Feb. 6, 1974) (mem). In a well written and extensively documented opinion, the Federal District Court of South Dakota, Northern Division, in the face of *Seymour* and *Mattz* and the recent decisions of the Eighth Circuit Court of Appeals, held that the Rosebud Reservation had in fact been diminished by a series of bills enacted over a six year period (1904-1910).

Since the legislative history of the Rosebud Reservation represents the transition period from modified cession agreements similar to the Sisseton-Wahpeton agreement to the exact "trust" replicas of the 1906 Colville Act, it is of a much more explicit and detailed nature than other legislative histories of many of the later acts which were simply introduced, understood and passed. In addition, because the Rosebud Reservation was the target of three separate acts, the partial opening effect similar to that described at 9-12, *supra*, is very pronounced, and enables one to view the effect of the acts both prospectively and retrospectively.

Therefore Petitioner will rely upon the above attributes of the Rosebud material to place this Court in a more advantageous position from which to view the whole process than was possible from an examination of the legislative history in *Seymour*. From this position Petitioner will urge the Court to depart from the rationale of *Seymour*, if such an argument need be maintained.

It will not be necessary to set forth in the text of this brief any of the Rosebud material. The issue was extensively briefed by both parties prior to the 53 page memorandum decision of the Federal District Court. Both the briefs and the opinion are set forth in Appendix II. On appeal to the Eighth Circuit Court

of Appeals the briefs of both parties were revised and updated and are set forth at Appendix III. Petitioner will rely on the arguments and legislative history presented therein.

Similarly, the Sisseton-Wahpeton materials and related documents discussed in Part I of this brief can be utilized in a like manner with respect to the rationale of *Mattz*.

In this respect, it is interesting to note that even after the decision of this Court in *Seymour*, only seven decisions have applied the rationale therein to similar acts "opening" other reservations. On the other hand, seventeen federal and state Supreme Court decisions have found distinctions upon which to base their reluctance to reestablish reservation boundaries where none existed. *See* discussion, *infra* at 96 98 .

2. In The Alternative, A Distinction.

> The ratification of agreements by the act of March 3, 1891 (26 Stats., 989), restored to the public domain. . . from the Lake Traverse Reservation, South Dakota, about 660,000 acres,. . . Report of the Commissioner of Indian Affairs, 44 (1891).

In 1891 the Commissioner of Indian Affairs aptly and unequivocally described theprecise effect the Act of March 3, 1891, had on the Lake Traverse Reservation. It is the position of Petitioner that this Court should not construe the rationale of either *Seymour* or *Mattz* as controlling in the instant case.

(a) *Seymour v. Superintendent*, 368 U.S. 351 (1962).

The primary and most significant distinction is of course on the face of the acts. The Act of March 3, 1891, was a sum certain cession agreement with the United States government whereby the United States bought and members of the Sisseton-Wahpeton band of Indians agreed to "cede, sell, relinquish, and convey to the United States all their claim, right,

title, and interest in and to" their surplus land. Act of March 3, 1891, 26 Stat. 1036 (1891). This certainly does not describe the "trust" situation in *Seymour v. Superintendent, supra.*

In fact, if any aspect of the *Seymour* opinion is analagous to the legislative history of the Sisseton-Wahpeton agreement it would be the 1892 Colville Act which did extinguish, subject to individual allotments, the north half of the Colville reservation. After all, 1891 Act in the instant case is chronologically much closer to the 1892 Colville Act than to the 1906 Colville Act, to say the least. One could rationally assume that it should be more in tune with the prevalent attitude of Congress at the time, especially in light of the Crow and Fort Berthold agreements discussed *supra*, that were procedurally on "all fours" with the 1892 Colville situation.

In addition, in *Seymour*, Justice Black deemed the public domain language of the 1892 Act significant. In this respect Petitioner would call this Court's attention to the Annual Report of the Commissioner of Indian Affairs and statements of Senator Dawes and other congressmen attributing the same precise effect to the Sisseton-Wahpeton Act. In both situations the allotments were to be situated on the public domain. Furthermore, immediately after the openings, both the 1892 Colville Reservation and the Lake Traverse Reservation were similarly removed from the Office of Indian Affairs Maps and Schedules recording the then existing Indian reservations in the United States. But for the fact that the 1892 Act affected only a portion of the Colville Reservation and the 1891 Act affected all of the Lake Traverse Reservation, the effect of both acts would have been the same.

Even Petitioner in *Seymour* recognized the importance of the similarities between the 1891 Sisseton-Wahpeton Act and

the 1892 Colville Act when it cited *Application of DeMarrias*, 77 S.D. 294, 91 N.W. 2d 480 (1958), and concluded that the acts had the same effect:

> *Application of Demarias*[sic], 77 S.D. 294, 91 N.W. 2d 400 (Resp. Br. 21), involved a burglary by an Indian on non-Indian land within the original boundaries of the Sisseton-Wahpeton Lake Traverse Indian Reservation in South Dakota. The land upon which the crime was committed, together with all other unallotted lands of the reservation, had been ceded to theUnited States in return for payment of a stipulated sum to the Indians. The cession was ratified by the Act of March 3, 1891, 26 Stat. 989, 1035-39, §§26-27, which provided *inter alia*, that lands ceded should be subject to the laws of the state. *Any similarity in the statutes relating to the Lake Traverse and Colville Reservations applies only to the north half of the Colville Reservation (ceded by the Act of 1892) and not to the diminished ("south half") reservation dealt with in the Act of 1906.* Reply Brief for Petitioner at 10, Seymour v. Superintendent, 368 U.S. 351 (1962) (emphasis added).

Secondly, Justice Black found that the 1906 Act repeatedly referred to the Colville Reservation in a manner that made it clear that the intent of Congress was that the reservation should continue to exist as such. Nothing in the Sisseton-Wahpeton Act can be fairly said to support a similar statement.

(b) *Mattz v. Arnett*, 412 U.S. 481 (1973).

As was the case with *Seymour*, the most significant distinction between the Klamath River and Sisseton-Wahpeton Acts appears on the face of the acts. In the 1892 Klamath River Act theUnited States did not conclude an agreement with the residents of the Klamath River Reservation wherby they agreed to ". . .cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to. . ." their surplus land for a sum certain as it did in the Sisseton-Wahpeton situation.

Nor was the United States government free to do anything it wanted with the proceeds from the sale of the lands to the settlers in the 1892 Klamath River Act as it was in the Sisseton-Wahpeton situation. Again, as was the case with *Seymour*,the 1891 Sisseton-Wahpeton Act more closely parallels the 1892 Colville Act in both respects.

Similarly, as was the case in *Seymour*, Petitioner in *Mattz* recognized and primarily relied on this cession distinction specifically when he stated in the text of the reply brief on the merits that:

> *Ellis v. Page, supra*, for example, involved an agreement between the Government and the Indians which provided that the tribes occupying the reservation would
>
> "cede, convey, transfer, relinguish [sic], and surrender, forever and absolutely, without any reservation whatsoever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced [within the reservation.]"
>
> The court described those words as 'unequivocal' (351 F.2d 250 at 252) and said
>
> "In treaty parlance they are as appropriate to disestablish the reservations as the Congressional words 'vacate and restore' employ in the 1892 Act to disestablish a part of the Colville Reservation."
>
> In other words, the Tenth Circuit based its decision on what it considered language showing a clear intent to terminate.[3]
>
> *Tooisgah, supra*, and *DeMarrias, supra*, were based on agreements that are indistinguishable from the one considered in *Ellis*.
>
> The approach adopted by the *Ellis* court is exactly what Petitioner believes is required here. To terminate a reservation a statute must use a phrase such as. . . .Reply Brief for Petitioner at 7-8, *Mattz v. Arnett*, 412 U.S. 481 (1973).

Significantly, this language does restore surplus lands to the public domain.

Secondly, considerable importance was attached in the *Mattz* opinion to the fact that prior efforts to restore the surplus lands to the public domain in the Klamath River legislative history had failed. *Mattz v. Arnett, supra,* at . While only certain quarters of the House favored such action in the Klamath River situation, this was definitely not the case with the Sisseton-Wahpeton agreement. The language of the annual report of the Commissioner of Indian Affairs, Senator Dawes and the other members of Congress who addressed themselves to the issue, all attributed the "public domain" effect to the Act of March 3, 1891. In this act Congress did "terminate the reservation and open it for white settlement" *Mattz v. Arnett, supra,* at .

The remaining and perhaps most important single statement of the *Mattz* opinion, as it relates to the instant case, is the standard of termination or disestablishment set forth therein: "...A congressional determination to terminate must be expressed onthe face of the Act or be clear from the surrounding circumstances and legislative history...." *Mattz v. Arnett, supra,* at . In this respect Petitioner would submit that the Sisseton-Wahpeton material set forth in Part I, *supra*, surpasses that which is required–both on the face of the act and *especially* in light of the surrounding circumstances and legislative history.

III.

A CONSIDERATION OF THE STATUTORY DEFINITION OF INDIAN COUNTRY IS NOT RELEVANT UNTIL AFTER THE STATUS OF THE LAKE TRAVERSE RESERVATION HAS BEEN RESOLVED.

Petitioner has waited until this point to discuss the jurisdictional implications of the material herein for the simple reason that it is not until after this Court has examined such material that a consideration of 18 U.S.C. §1151 becomes relevant. The attempt on the part of the United States to insert its 1948 "crazy-quilt" argument at the outset of what should have been essentially a discussion of congresssional intent at the turn of the century, is wholly misplaced, literally and figuratively. By following this argument to its logical conclusion, one would end up with approximately one-fifth of the entire western half of the United States "within" the boundaries of reservations that have heretofore been disestablished and restored to the public domain.

The definition of Indian Country is set forth at 18 U.S.C.§1151.

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b)all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running

through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139 §25, 63Stat. 94.

Only subsections (a) and (c) are relevant to the issue presented herein.

A. 18 U.S.C. §1151(a): WITHIN THE LIMITS OF ANY INDIAN RESERVATION.

In 1948 when the definition of Indian Country was revised to its present form, it was the almost unanimous conclusion of the state and federal courts that "opened reservations" were not reservations at all. Rather, this terminology denoted areas which were once reservations but had been disestablished by special acts of Congress.

For example, in the Crow situation described, *supra*, after the opening the boundaries were receded to encompass the area remaning or the diminished reservation, the opened reservation was no longer within the boundaries of the Crow Reservation, although it continued to be improperly referred to as the "opeened reservation." The trust allotments situated on the "opened" portions were interspersed among the fee land of the settlers after the opening–outside the boundaries of the reservation.

The trust allotments within the boundaries of the reservation were interspersed among the rest of the undivided tracts of trust land. After a period of time, the United States no longer held the title to all the area within the boundaries of the reservation in "trust." Primarily this situationwas the result of the issuance of patents in fee to individual members of the tribe for one reason or another. In some instances the title to the land was further removed from the United States by the transfer thereof to another person –sometimes a member of the

tribe and sometimes not.

This whole process soon resulted in the "checkerboarding" of fee and trust land *within* the diminished reservation. The jurisdictional ramifications soon resulted in a hotly contested issue in many of the state and federal courts. In 1948 Congress resolved the issue by defining Indian Country, in part, as

> (a) [A]ll land within the limits of any Indian reservation under the jurisdiction of the United States government, not withstanding the issuance of any patent, and, including rights-of-way running through the reservation . . . 18 U.S.C. §1151

In effect, Congress had codified the decisions of those courts which had previously resolved the issue consonant with the definition. One such decision upon which the Reviser relied was the 1943 decision of *Kills Plenty v. United States*, 133 F. 2d 292 (C.A.8 1943), *cert. den.* 319 U.S. 759 (1943). *See* Reviser's Note, 18 U.S.C. §1153.

In *Kills Plenty* the Eighth Circuit Court of Appeals held that all of the land within Todd County was "Indian country" irrespective of the issuance of patents in fee. Todd County was the only county of the original Rosebud Reservation that had *never* been "opened" to settlement. Todd County was, for all purposes, the Rosebud Reservation, sometimes referred to as the diminished Rosebud Reservation in acts of Congress, opinions of state and federal courts, the Office and Bureau of Indian Affairs, maps, and every other source one can imagine from 1910 until 1972. *See* Appendix II, Appendix III. In 1943 areas that were once reservations but were subsequently opened by special acts of Congress were *not* within the boundaries of reservations any more than the opened portion of theCrow Reservation was within the new boundaries of the

diminished Crow Reservation.

Indeed, no one can read the *Kills Plenty* decision and the cases cited therein and support a contrary conclusion. This was the decided, almost unanimous, view in 1943 in all of the decisions of the state and federal courts. One can only imagine how the Reviser of 18 U.S.C.§1151 would have reacted had the Eighth Circuit Court of Appeals in 1950 reversed *Kills Plenty* and held that the boundaries of the Rosebud Reservation did not really encompass the diminished Rosebud Reservation, but actually remained as originally established in 1889, encompassing areas which werenot within the boundaries of *the* reservation for over 40 years.

It is interesting to note that the 1922 decision of *United States v. Frank Black Spotted Horse*, 282 F.349 (D.S.D. 1922), cited by Justice Black with approval in *Seymour* dealt with the same checkerboard situation resolved by the court in *Kills Plenty*: Todd County, the diminished Rosebud Reservation. The court in *Frank Black Spotted Horse* resolved the issue in the same manner that was later followed in *Kills Plenty*. When the Reviser cited Kills Plenty with approval he was in effect eliminating the impractical pattern of checkerboard jurisdiction. But this was "within" a diminished reservation that had never been "opened." Petitioner has not been able to ascertain from a reading of Seymour why Justice Black thought that such a situation within a portion of a reservation that had never been opened was persuasive in eliminating the impractical pattern of checkerboard jurisdiction in a reservation that had been "opened."

In one respect, this absence of any citations in the*Seymour* opinion to precedence on "all fours" with the Colville "open" reservation situation is understandable. *See* discussion at

§4-§§, supra. Prior to the decision, the *decided weight* of authority had for fifty years reached a contrary conclusion. Even more interesting, however, is the fact that even *after* the *Seymour* decision, in seventeen separate instances, state and federal courts still refused to apply the rationale therein to other reservations which had been "opened." *DeMarrias v. State of South Dakota*, 319 F.2d 845 (C.A. 8 1963), *aff'g* 206 F. Supp. 549 (D.S.D. 1962); *Ellis v. Page*, 351 F.2d 250 (C.A. 10 1965), *aff'g Ellis v. State*, 386 P.2d 326 (Okl. Cr. 1963); *Lafferty v. State ex rel. Jameson*, 80 S.D. 411, 125 N.W. 2d 171 (1963); *Wood v. Jameson* 81 S.D. 12, 130 N.W. 2d 95 (1964); *Bird in the Ground v. District Court, 239 F. Supp. 981 (D.Mont. 1965); State v. Barnes*, 81 S.D. 511, 137 N.W. 2d 683(1965); *State ex rel. Swift v. Erickson*, 82 S.D. 60, 141 N.W. 2d 1 (1966); *Bear [illegible]e v. United States*, 387 F.2d 280 (C.A. 8 1967) (dictum); *State v. Moss*, 471 P.2d 333 (Wyo. 1970); *State v. Satiacum*, 80 Wash. 2d 492, 495, P.2d 1035 (1972); *State v. Williamson, 211 N.W.2d 182 (S.D. 1973); DeCoteau v. District Court*, 211 N.W.2d 843 (S.D. 1973); *Rosebud Sioux Tribe v. Kneip*, No. Civ 72-4055 (D.S.D, filed Feb. 6, 1974) (mem.); *Cook v. State*, 87 S.D. , 215 N.W. 2d 832 (1974); and *United States ex rel. Feather v. Erickson*, No. (D.S.D. filed May 30, 1973).

Perhaps these refusals to follow *Seymour* were simply a result of a reluctance to recreate reservation boundaries which had for over fifty years been disestablished. Perhaps some of the older decisions remained persuasive even against the glare of the *holding* in *Seymour*.

In any event, in only seven instances since the decision in *Seymour* have courts applied the rationale thereof to "open" reservations and in the majority of these the questions were "close," the materials "inconsistent and confusing" or opinion

founded upon a reluctance of a state court to disagree on a federal question. *United States ex rel. Condon v. Erickson*, 344 F. Supp. 777 (D.S.D. 1972); *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (C.A. 8 1973); *Leech Lake Band of Chippewa Indians v. Herbst*, 344 F. Supp. 1001 (D. Minn. 1971); *City of New Town v. United States*, 454 F.2d 121 (C.A. 8 1972); *State v. Molash*, 199 N. W. 2d 591 (S.D. 1972); *Mattz v. Arnett*, 412 U.S. 481 (1973); and *United States ex rel. Feather v. Erickson*, 489 F2d 99 (C.A. 8 1973).

B. 18 U.S.C. §1151(c): ALLOTMENTS ON THE PUBLIC DOMAIN.

In 1948 even Congress realized that the definition of Indian Country set forth in 18 U.S.C.§1151(a) would not encompass those trust allotments on the public domain in the opened areas of what had thertofore been reservations.

As a result, 18 U.S.C.§1151(c) was set forth as an addition to the definition of Indian Country.

> (c) [A]ll Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Logically enough, to support the continuation of these allotments as Indian Country, the Reviser cited *tne decision of this Court which held that allotments on the public domain in the opened areas of what had theretofore been reservations should continue to be subject to federal jurisdiction: United States v. Pelican, 232 U.S. 442 (1913)*

> Indian allotments were included in the definition on authority of the case of U.S. v. Pelican, 1913, 34 S. Ct. 396, 232 U.S. 442, 58 L.Ed. 676. Eighth Congress House Report No. 304. Reviser's Note. 18 U.S.C.

§1151.

In *Pelican* this Court held that federal jurisdiction was not extinguished merely because the trust allotment had been left behind on the public domain when the boundaries of a reservation were receded after the opening of that reservation. Specifically, this Court in *Pelican* was involved with the 1892 opening of the Colville Reservation which disestablished approximately one half of the Colville Reservation in the same manner as the Crow situation discussed, *supra*. To this extent, 18 U.S.C. §1151(c) specifically approved and provided for the impractical pattern of checkerboard jurisdiction. Some provision had to be made for the opening that left behind trust allotments situated on the public domain outside the boundaries of a reservation. Petitioner would submit that this provision, 18 U.S.C. §1151(c) was specifically tailored to fit precisely the situation presented by the Sisseton-Wahpeton opening.

It is interesting to note that as recently as 1967, the Eighth Circuit Court of Appeals, which had for years handed down cogent and authoritative decisions like *Kills Plenty* concurred in this analysis in another cogent and well-written opinion, *Beardslee v. United States, 387 F.2d 280 (C.A. 8, 1967).*

Oddly enough the issue in *Beardslee* was the same issue that had been previously presented in Frank Black Spotted Horse and *Kills Plenty*: checkerboard jurisdiction in the diminished Rosebud Reservation, Todd County. The court in *Beardslee* reaffirmed both of the previous decisions on point. Disestablishment could not be affected merely by the issuance of fee patents to an Indian or the conveyance thereof to another person. In 1948 Congress had eliminated the impractical pattern of checkerboard jurisdiction within

reservations that had never been opened.

But this had nothing to do with the "opened" areas of what had theretofore been reservations and the court in *Beardslee* recognized the distinction.

> . . .Clause (c) came into the statute as the result of the holding in *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1942), namely, that lands allotted to Indians remained within the definition of Indian country even though the rest of the reservation was opened to settlement. See Reviser's Note following 18 U.S.C.A. § 1151 (1966), and 80th Congress House Report No. 304. Clause (c) is an addition to and not a limitation upon the definition of Indian country embraced in the preceding portions of §1151. We regard (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent". Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seem to be clear. *Beardslee, supra* at 287.

The above analysis was soundly founded upon a careful reading of precedence, the Reviser's Notes of 18 U.S.C. §1151 and citations therein, and represents the most thorough treatment of the question to date.

CONCLUSION

Petitioner has never questioned the validity or the necessity for the absence of checkerboard jurisdiction within the boundaries of reservations. But this whole process of commencing the consideration of issues similar to the nature of the one presented herein with the 1948 statutory definition of Indian Country could eventually lead to the resurrection of boundaries of reservations encompassing each and every

allotment in the United States–boundaries which have been disestablished for over 80 years.

If one were simply concerned with the loss of state jurisdiction over members of the various tribes residing in areas predominantly populated by the same, a recreation of the situation as its existed on the maps of Indian reservations in 1870 or 1880 would not be a monumental catastrophe.

Unfortunately, this is not the case. Thousands of other citizens now reside on farms and ranches and in cities and towns in the areas that would be engulfed by such a process. These individuals settled on the public domain and were never required or asked to abide by any of the special federal statutes concerned with various aspects of life within the boundaries of a reservation. Nor have they been subject to whatever "sovereign power" any tribe might, today or 50 years from today, exercise over non-members residing within the boundaries of a reservation.

Many of the citizens of the United States have *elected* to live within the boundaries of a reservation. They have knowingly decided to subject their lives and property to the many special federal and tribal laws therein. This was a choice presumably made with the realization of the consequences thereof. Such is not the case in the situation presented herein.

The members of the Sisseton–Wahpeton Tribe elected to cede their reservation in 1889. Congress ratified the cession in the Act of May 3, 1891. Since that time, the tribe has prospered. The tribal organization and the Bureau of Indian Affairs have worked hand in hand in many instances with the State, to achieve this result. A portion of the land has always been held in "trust" and as such remains Indian Country today, but it has never been within the boundaries of the Lake

Traverse Reservation since that reservation was disestablished by the Act of March 3, 1891. Petitioner would submit that no sovereign necessity exists today to disregard the import of theprobative evidence of that disestablishment presented herein.

It is respectfully submitted that the ruling of the Eighth Circuit Court of Appeals is erroneous. It should be reversed and that court instructed to deny Respondents' applications for writs of habeas corpus.

Respectfully submitted,

KERMIT A. SANDE
Attorney General of South Dakota

WALTER W. ANDRE
Assistant Attorney General

TOM D. TOBIN
Special Assistant Attorney General

Attorneys for Petitioner.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, *Petitioner*,

v.

United States of America, *ex rel.*
JOHN LEE FEATHER, *Respondent*,

United States of America, *ex rel.*
LAVERNE BLACK THUNDER, *Respondent*,

United States of America, *ex rel.*
AMBROSE ST. JOHN, *Respondent*,

United States of America, *ex rel.*
JAMES R. KEEBLE, *Respondent*,

United States of America, *ex rel.*
CURTIS SMALL, *Respondent*,

United States of America, *ex rel.*
ROMAN V. DERBY, *Respondent*,

United States of America, *ex rel.*
JOSEPH DAY, *Respondent*,

United States of America, *ex rel.*
ARNOLD LAFROMBOISE, *Respondent*,

United States of America, *ex rel.*
CLARENCE WALKER, *Respondent*,

United States of America, *ex rel.*
THEODORE DUANE WYNDE, *Respondent*.

continued

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

L. R. GUSTAFSON
Britton, South Dakota 57430
Attorney for Respondents

Washington, D.C. • CLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Whether or not the Federal Government and the Tribe have jurisdiction on criminal matters within the Sisseton-Wahpeton Indian Reservation that is also known as the Lake Traverse Reservation, as against the State having jurisdiction.

SUMMARY OF ARGUMENT

From the last Treaty with the Indians on the Lake Traverse Reservation of 1867, which established this Reservation as a permanent reservation and created this reservation as Indian country under the protection of the United States and the Indian Tribe, Congressional Enactment thereafter, including the Enactment of our present Code Sections 18 U.S.C.A. 1151 and 1153, as well as the Enactment of the Act of August 15, 1953, and the one of April 11, 1968, wherein Congress established the formula for the state to assume jurisdiction over the Indians, which the State of South Dakota has never seen fit to accept, and the cases not only before this Supreme Court such as Seymour and Mattz of the most recent ones but starting with *Worcester v. George*, have kept the jurisdiction of the Indians under the United States of America and even in the opening of this land for homesteading by the President's Proclamation used the words within the reservation.

ARGUMENT

We realize that we are not following the Appellant's Question Presented for we feel that he is only limiting this to one little part and that is not the law involved, and we think that the question is much broader really—who has criminal jurisdiction.

It appears that one place that all of us can start in this matter is the Treaty of 1867 which is found in Respondents' Appendix No. 1, and this is seemingly the last foundation item that all of us are in agreement on. Shortly after this Treaty with the Sisseton-Wahpeton Indians, and by the Act of May 3, 1871, which is found in 16 Stat. 566, and is now in our 25 U.S.C.A. 71, that we wouldn't make treaties with Indians any longer but we still make agreements with them. However, this states:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty but no obligation of any treaty lawfully made and ratified with any Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

There have been some cases and possibly here some disagreements trying to interpret an agreement that was made with the Sisseton-Wahpeton Band of Dakota or Sioux Indians, that is Appendix No. 2 in total, and we would like to call attention to the Court that the Indians did by this instrument "cede, sell, relinquish and convey to the United States" certain land within this reservation. It is also pertinent to note that a certain part of this reservation was set aside for the Indians and that the money derived from the sale of this land for home-

steading and townsites would be held in trust by the United States for the Indians.

They also were trying to adjust some prior inequities that seemingly had existed for a number of years inasmuch as this band of Indians had not been in the '62 uprising but had remained loyal and fought for the United States of America so they were paying them some more money besides the amount that was put in trust from the land that was purchased, and that part of this land was to be opened for settlers as is more fully set forth in the Act of Congress, 26 Stat. 1035, which is Respondents' Appendix No. 2 and it states:

> "after deducting the said five hundred and three thousand two hundred dollars, to wit, the sum of one million six hundred and ninety-nine thousand eight hundred dollars, or so much thereof as may be necessary, to pay for lands by said agreement or so much thereof as may be necessary, to pay for lands by said agreement ceded, sold, relinquished, and conveyed at the rate of two dollars and fifty cents per acre, shall be placed in the Treasury of the United States, to the credit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians (parties to said agreement), and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress or to application by order of the President for the education and civilization of said bands of Indians or members thereof,"

so this money was held in trust for the Indians on this Reservation.

It is also notable in this under Section 30 that this land

> "be subject only to entry and settlement under the homestead and townsite laws of the United States, except the 16th and 36th Section of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located."

We think that it is very pertinent to note that this land was not to be used except for homesteading and townsite purposes and to try and get people to try and help the Indians by them observing other farmers and seeing how these Indians could be helped in getting them self sufficient, which was a very commendable approach and was one with which the Federal Government was and has been attempting for some time.

In fact, in Section 26 of this, in ratifying this 1889 Agreement in 1891, Congress even stated:

> "All the allocated lands *within* the limits of the Reservation" (emphasis added)

It is also pertinent at this point to note that as is specified in Section 30 of this 1891 Act supra, that Sections 16 and 36 were only reserved for common school purposes and the words "subject to the laws of this state" added thereafter to this does not necessarily say that they are subject to the jurisdiction of the State. *United States v. Thomas*, 151 U.S. 577 on page 585, an 1894 case, supports this construction wherein in that case the Court recognized the obligation of the United States as guardian to protect the Indian wards and held that the Federal Court would have jurisdiction over crimes committed by Indians on the Section 36 within the Reservation, but that these sections had been ceded to the State for school purposes.

Several other agreements have had this same treatment except that no comma was placed before the word "and".

> Act of May 3, 1891, 26 Stat. 1039, Crow Reservation

Act of May 29, 1908, 35 Stat. 460, Cheyenne Reservation
Act of March 27, 1904, 33 Stat. 319, Devils Lake
Act of August 15, 1894, 28 Stat. 314
Act of June 6, 1900, 31 Stat. 672

The last several lines of the above quotation of Section 30, and one that has given our South Dakota Supreme Court a great deal of trouble, and perhaps it is one of the reasons that we have to be here today, *DeMarrias v. State*, 91 N.W.2d 480, South Dakota 1958, and *DeMarrias v. State*, 107 N.W.2d 255, South Dakota 1961, as it has been interpreted and we think wrongly so, and the Circuit Court of Appeals in the original case that we have here, *Feather v. Erickson*, 489 F.2d 99, stated that this being subject to the jurisdiction of the state wherein located did not apply to all of the land, but only at the most to Sections 16 and 36.

We think there have been some other things that have come down through the times in the form of showing Congressional intent that definitely establish that it was not the intention or the meaning of this at any time to have this as applying to all of the reservation. In fact the State of South Dakota does not even think that it applies to all of the reservation but they have admitted that the tracts of land within the reservation that were allotted to the respective individual Indians, and in this case it was not allotted to the tribes especially but to individual Indians, is still subject to Federal jurisdiction. We, on the other hand, maintain that all of it is subject to Federal jurisdiction and brings us up to the definition of Indian country as is set out in full in Appendix No. 3.

Also set out in this Appendix is the historical and reviser's notes as they appear in 18 U.S.C.A. 1151, but we feel that it is important here that we go ahead and

discuss this for in defining Indian country at least for the purposes of Federal jurisdiction and Indian Tribal Court jurisdiction, and definitely setting forth that the State does not have jurisdiction, states that:

> "the term, 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation".

We agree whole heartedly with the way that this was discussed and set out in an earlier case of this Court, *Seymour v. Superintendent*, 368 U.S. 351 (1962).

The Seymour case supra, and our case have a great deal in common as both of them were opened up for settlement under the homestead laws on the surplus lands within the Reservation after the Government had purchased this and was holding the money in trust, and nowhere in either instance is there any language expressing vacating the reservation and restoring the land to public domain.

As is expressed in *United States v. Celestine*, 215 U.S. 278, 30 S.Ct. 93, 54 L. Ed. 195,

> "Once Congress has established a reservation it remains so until separated therefrom by Congress."

In the case before this Court we can find no place where Congress has separated any of the reservation and therefore it is still all Indian country, #1151.

In fact, our South Dakota Supreme Court in *State of South Dakota v. Molash*, 199 N.W.2d 591, which took place on another reservation within the State of South Dakota, but being on a plateau with the case at bar, and upon deeded land but within the Standing Rock Indian Reservation, stated:

"The term 'Indian country' has been defined by Congress as 'all land within the limits of any Indian reservation under the jurisdiction of the United States notwithstanding the issuance of any patent'. Act of June 25, 1948, 62 Stat. #1151, Page 757, 18 U.S.C.A. 1151, as amended. It is established that state jurisdiction does not extend to Indians in Indian country, *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L. Ed.2d 251, and in *Smith v. Temple*, 82 S.D. 650, 152 N.W.2d 547, and cases cited therein, we recognized the following rules and principles:

'1. The disclaimer of jurisdiction contained in our Enabling Act and Constitution deprives our state of criminal jurisdiction over Indians and Indian territory;

'2. Public Law 280 (Chapter 505, 62 Stat. 588) is not a present grant of jurisdiction and this state has not effectively, affirmatively, and unequivocally acted to assume jurisdiction in the manner specified in such Act,' (Chapter 467 of the Laws of 1963 was a statutory effort by the state to comply with Public Law 280 which was referred to and rejected by the electorate of the State of South Dakota in 1964) therefore,

'3. Criminal jurisdiction over Indians for crimes committed within Indian territory in South Dakota is exclusively vested in the Federal and Tribal Courts.' "

So our Supreme Court agrees with this same theory as is expressed in Seymour supra, and also we find this very well expressed in *Condon v. Erickson*, 478 F.2d. 684 (8th Circ. 1973). Admittedly both Molash supra and Condon supra were on different reservations, Molash being on the Standing Rock Reservation and Condon on the Cheyenne Reservation; however, both of them were in the State of

South Dakota, and the cases involved here are for the Sisseton-Wahpeton Reservation.

In both of these cases they come back to Seymour supra which seems to be one of the main cases that our recent case law has been coming back to and should be considered by all of us very thoroughly, and they state this, I think better than I have the ability to do, and perhaps in a more forceful manner, as follows:

"(4) Counsel for the State of Washington present two alternative contentions which, if sound, would sustain the jurisdiction of the State over the land here in question even if the Act of 1906 did not completely dissolve the reservation in the manner held by the Washington courts. The first of these rests upon the assertion that the particular parcel of land upon which this burglary was committed is held under a patent in fee by a non-Indian. The contention is that, even though the reservation was not dissolved completely by the Act permitting non-Indian settlers to come upon it, its limits would be diminished by the actual purchase of land within it by non-Indians because land owned in fee by non-Indians cannot be said to be reserved for Indians. This contention is not entirely implausible on its face and, indeed, at one time had the support of distinguished commentators on Indian law. *But the issue has since been squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in #1151 to include 'all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent* * * *'*

'(5) The State urges that we interpret the words 'notwithstanding the issuance of any patent' to mean only notwithstanding the issuance of any patent to an Indian. But the State does not suggest,

nor can we find, any adequate justification for such an interpretation. Quite the contrary, it seems to us that the strongest argument against the exclusion of patented lands from an Indian reservation applies with equal force to patents issued to non-Indians and Indians alike. For that argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. *Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of #1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid."* (Emphasis added)

It should be noted at this time that as one of the conditions to South Dakota becoming a state they adopted Article XXII, which is Appendix No. 4, and before this Agreement that was ratified in 1891 by the United States Congress, 26 Stat. 1035, which is Appendix No. 2, that all lands lying within said limits owned or held by any Indian or Indian tribes and that the title thereto shall not have been extinguished by the United States, the same shall remain subject to the disposition of the United States and that the Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. Here again, Congress has not seen fit to terminate this control over their Indians on these Indian Reservations and Indian lands.

It is also very pertinent that in 1901 the State of South Dakota also relinquished to the United States exclusive jurisdiction and authority to arrest, prosecute, convict and punish all persons in violation of Federal laws when committed upon any reservation, and by an Act of February 2, 1903, 32 S.Ct. 793, Congress granted jurisdiction to the United States District Court for the State of South Dakota to hear and try all persons committing crimes on Indian Reservations.

This 1903 Act of the Government, of course, shows intention to assume all this jurisdiction. They already had it as it had never been relinquished according to our research but even if they had, they got it all back, and the State of South Dakota in their 1901 Act did relinquish all their jurisdiction regardless what it was prior to that time.

The State of South Dakota did not see fit that this jurisdictional question was a two-way street, but as is shown by Appendix No. 5, giving all of the Statutes as they have become to develop, it starts to erode and the State tried to assume partial jurisdiction as is set out in 34.0502 really on a concurrent jurisdiction. However, coming to 23-9-4 and 23-9-9 that is not as enlightened as it might be but inasmuch as the Federal Government has not relinquished any jurisdiction since 1903, we believe that this is entirely immaterial and it does make a whole lot stronger case than was set forth in the Seymour case, and it also shows an intent upon the Federal Government to assume exclusive jurisdiction over this Indian country and on all property within the reservation, and also excluding from State jurisdiction by the State, any jurisdiction.

Right after the turn of the century, therefore, the State and Federal Government seemingly were in agreement that the State would assume no jurisdiction and the

Federal Government would assume all jurisdiction. However, the State has tried to erode this and perhaps is the reason that we are now before this Court.

It is our contention, however, that even if the State wants to change this as the enactments of these various Statutes would indicate, the Federal Government has not gone along with it and, therefore, it is of no force and effect as far as we are concerned here.

In this same element of intent there is another part that we feel cannot be overlooked and as is set forth in 18 U.S.C.A. 3242, "Indians committing certain offenses; acts on reservations", and its history and reviser's notes as set forth in Appendix No. 6. By the reviser's notes he states:

> "1949 Amendment. Act May 24, 1949, substituted 'within the Indian country' for 'within any Indian reservation, including rights-of-way running through the reservation,' "

Also these reviser's notes state:

> "Section 549 of said title 18, relating to crimes in Indian reservations in South Dakota, was omitted as covered by section 1153 of this title. Accordingly the last sentence of said section 548, extending this section to prosecutions of Indians in South Dakota, was also omitted as unnecessary because this section is sufficient and applicable. Other provisions of said section 548 are incorporated in sections 1151 and 1153 of this title."

So again in 1949 we definitely find the intent of Congress in amendments of these parts and of the reviser's notes.

The President's Proclamation of April 11, 1892, 27 Stat. 1071, in Appendix No. 7, also states very definitely the intention of at least the Executive Branch of the Government as under No. 1 and No. 2, he states:

> "All that portion of the Lake Traverse Reservation . . . "

Also he states in this Proclamation:

> "The lands to be opened for settlement and for greater convenience, particularly described in the accompanying schedule entitled schedule of lands *within* the Lake Traverse Reservation open to settlement by Proclamation of the President dated April 11, 1892." (Emphasis added)

In connection with this Proclamation, the President at that time warned that until the official opening of this Reservation no entry was to be made upon the Reservation lands except by the Indians, and if the lands had been excluded from the Reservation, the Indians wouldn't have any more right on there than others would have, and he would not have made such a warning.

It is also of more than passing interest that there were rulings by the Executive Branch of our Government on two instances concerning the homesteading or the seeking of homesteads by non-Indians upon the opening of these lands under the 1891 Act.

In the Matter of Madella O. Wilson it was decided on August 10, 1893, by the First Assistant Secretary of the Interior wherein he states:

> "in the Sisseton-Wahpeton Indian Reservation"
> 17 L.D. 153

and also we have the Edward Parant matter decided on January 21, 1895, by the Secretary of Interior himself, stating that Parant was not:

> "disqualified to take a homestead *in the Lake Traverse Reservation*" (emphasis added)
> 20 L.D. 53

and also the Indian Agent at Sisseton in his annual report

of 1895 wherein he was describing the Lake Traverse Reservation comprising 918, 780 acres of land, and this is the same number of acres, to-wit: 918,780 acres, that is set forth in the 1867 Treaty supra.

And in 1900 the Indian Agent at Sisseton describes an undiminished Reservation when he states:

> "The Reservation is in the northeast part of South Dakota, occupying part of Roberts, Day, Grant, Marshall and Codington Counties and extending into Richland and Sargent Counties of North Dakota. It is about 120 miles long and at the state line 42 miles wide, coming to a point near Watertown, South Dakota . . . and there are 1970 allocated pieces of land situated from one end of the reservation to the other."
>
> Annual Report Commissioner of Indian Affairs
> United States Indian Affairs Office 385

So we have some very definite things here that we can rely on; that is, that the last treaty that was made with this band of Indians in 1867, the Federal Government has jurisdiction and this would be considered Indian country. The State of South Dakota said all of this by their Articles of the Constitution in 1889. We feel that the agreement with the Indians after treaties could no longer be made certainly did not by any stretch of the imagination diminish the reservation, and that it was a continuation of their policy of opening part of this reservation for homesteading, which does not reduce the reservation, Seymour supra, and the Executive Branch of the Government in 1892 opening up the reservation definitely used the word "within" and in 1903 the Federal Government assumed jurisdiction of all reservations and in 1949 the Federal Government still felt by their pronounced statutes that all of the territory was Indian country.

Kills Plenty v. United States, 133 F.2d 292, Certiorari denied 1943, 63 S.Ct. 1172, makes a good discussion of these Federal statutes in the State of South Dakota, not from the theory of intention as we have used them in this brief at least partially, but also from the theory that this was a complete relinquishment and it really was an agreement between the State of South Dakota and the United States of America that the United States of America had exclusive jurisdiction upon this Rosebud Reservation that they were speaking of, but their reasoning as set forth in this would apply to the Sisseton-Wahpeton Reservation as well when Judge Sanborn stated:

> "It is contended by the appellants that the words 'within the limits of any Indian reservation' should be construed as though they read, 'within the limits of any Indian reservation upon lands therein the Indian title to which has not been extinguished.' We think that Congress did not intend that any such limitation should be read into this statute. The statute, in effect, represents a compact between the State of South Dakota and the United States whereby the United States agreed to prosecute in the United States District Court for the District of South Dakota persons charged with certain major crimes committed within the boundaries of the Indian reservations in that State."

This comes back and we find the same type of argument in the Seymour case supra where the State was trying to write in when it stated under No. 1151 "notwithstanding the issuance of any patent" to mean only the issuance of a patent to an Indian, and again as our United States Supreme Court so ably stated that they cannot find any adequate justification for such an interpretation, and if this cannot be found then all of the

country within the exterior boundaries of this reservation would be Indian Country as per 1151.

A map of this reservation is found under Appendix No. 8, and from this it can be seen that there is a checkerboard, or crazy-quilt if you will, pattern in this reservation the same as was expressed in the Seymour supra case, and that we follow the ruling as was expressed in Seymour:

> "Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of #1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid."

Another of our more recent cases is *City of New Town, North Dakota v. United States*, 454 F.2d 121 (1972), which is an action for a summary judgment to try and establish some of these conflicting ideas that have generated over the years, and again they followed Seymour supra, and also that opening up for homestead and townsites certain parts of the reservation is not inconsistent with the keeping of the reservation and that it does not diminish a reservation.

Mattz v. Arnett, 412 U.S. 481 (1973) does not deal directly with the criminal side; however, there is a great deal of the criminal part that is taken into consideration in the decision of this case which is another one in the same line with Seymour supra and has the same general set of facts as far as a reservation is concerned. However, some of it was done with Executive Order rather than by Congressional Enactment such as on the case at hand which does not make it as strong.

With the unallocated lands being made available to

non-Indians with the purpose in particular of promoting interaction of the races and encouraging Indians to adopt white ways and the Court here recognized the analogous setting of Seymour supra, so when the petitioner was seeking to have his fish nets returned to him, this being a civil action, the same rules were applied as were applied in Seymour and as we feel the Court should apply in this case, and was applied by the lower Court, excluding the State jurisdiction.

The first of these Indian cases that came down is in *Worcester v. Georgia*, 31 U.S. (6 Pet) 515 and in 1832 wherein the policy as regarding our Government and the Indians was first acknowledged, and it was held by Justice Marshall that the Indian nations were:

> "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged but guaranteed by the United States."

It follows from this concept of the Indian Reservations as separate and independent, that State law could have no role within the Reservation boundaries, and that there is a distinct community within which the State laws have no force, and as Justice Marshall stated:

> "The intercourse between the United States and this nation is, by our constitution and laws, vested in the United States of America." *Ex parte Crow Dog*, 109 U.S. 556 (1883), *United States v. Kagama*, 118 U.S. 375 (1886)

The last of our Indian cases that has come up before our United States Supreme Court is *McClanahan v. State Tax Commissioner*, 41 LW 4457, which gives us a lot of

the reasoning back of all of this and citing *Williams v. Lee*, 358 U.S. 217, a 1959 case where it states:

> "Over the years this Court has modified [the Worcester principle] in cases where essential tribal relations were not involved and where the right of Indians would not be jeopardized . . . Thus, suits by Indians against outsiders in state courts have been sanctioned . . . And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation . . . But *if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive* . . . Essentially, absent governing Acts of Congress, the question has always been whether the state action infringes on the right of reservation Indians to make their own laws and be ruled by them." (Emphasis added)

In the McClanahan case supra, it is interesting to note that when Arizona entered the Union that they had a similar agreement on these Indian lands as did South Dakota and was cited heretofore.

There have been a number of other cases as well, but it boils down to a part of whether the State of South Dakota is going to be an island on itself and decide these issues differently from our Federal Courts decided them, and where the rights of Indians are involved it seems to be admitted by all that the Federal Government does have the right to make this determination and unless there is some express relinquishment of this right by Congress as is set out in Celestine supra, the State governments must take a hands-off attitude even where they have tried to infringe upon these Federal rights without having any Federal right part as we have found in our state where the State Legislature has changed the

laws and attempted to change the agreement with the Federal Government but without Congressional approval or consent or even knowledge, for it does not appear that Congress has even been asked to have concurrent jurisdiction.

We have in the last years had two attempts at giving Federal Court jurisdiction in the early 50's and the early 60's which were turned down by the State of South Dakota completely and entirely which also goes back to the intention that the people of South Dakota do not want to assume this jurisdiction.

Unless we have an island of the State of South Dakota but it is on Federal decisions, and the Circuit Court of Appeals has not seen fit to follow these decisions, we will have to have one decision that governs the whole part not only the Eighth Circuit Court decisions that have been following the United States Supreme Court but also our State decisions, which go both ways.

Judge Blackmun in his decision in *Beardslee v. United States of America*, 387 F.2d 280, brought this out when he stated:

> "Other courts almost uniformly have upheld Federal jurisdiction or denied state jurisdiction, where the offense was committed by an Indian within the boundaries of a reservation but on particular land not owned by an Indian. Disestablishment thus is not effected by an allotment to an Indian or by conveyance of the Indian title to a non-Indian."

This is the only way that this situation can be handled and handled efficiently and properly as otherwise we will run on to the situation that our United States Courts so ably commented about and held in the Seymour case supra, that we would have an almost impossible situation,

and it is interesting to note in this regard that Judge Lay of the Circuit Court of Appeals in *Miner v. Erickson*, 428 F.2d 623, in his minority opinion said that the officers "guessed" wrong and that is what we are going to be up against continually and all the way through here unless we will follow and affirm the decision that is now before this Court.

Long before the Seymour case, the State of Montana in *Irvine v. District Court of Fourth Judicial District* before the Supreme Court for the State of Montana, 239 P.2d 272, had this very same question before it, and the exhaustive history and discussion of this whole Indian question, we think, is remarkable and perhaps goes a little bit on the theory of guardian and ward and wards of the nation than the Seymour case does, but nevertheless following the same theory when it stated:

> "The fact that the Federal Government has alienated its fee in land or lands, by patent, which are situate within the limits of a regularly organized Indian reservation in the state does not divest it of its exclusive jurisdiction over its ward Indian, who has committed, within the limits of such an Indian reservation, one of the ten major crimes, and such Indian committing such a crime is accountable only to it for the offense." *Ex parte Pero and Moore*, 99 F.2d 28. Certiorari denied, *Lee v. Pero*, 59 S.Ct. 581

This issue also came up a few years later in *Bokas v. District Court of Fifteenth Judicial District*, 270 P.2d 396, and was affirmed by the Supreme Court of Montana again, and thereafter in *Guith v. United States of America*, 230 F.2d 481, the Circuit Court of Appeals for the Ninth Circuit, which was another Montana case, adopted this same theory.

CONCLUSIONS

After going through the earlier cases as the one handed down by Chief Justice Marshall in Worcester supra to the most recent cases of this Supreme Court that we are now before, in McClanahan supra, the pattern is definitely established that crimes committed by an Indian within the confines of the Indian Reservation are subject only to the laws of the United States of America, whether we adopt the strict legal part that the Federal Government has control over these lands, or we adopt the ward theory that the Indians are wards of the Federal Government, or whether we go by a hybrid or in between theory and adoption, some of both, which your writer prefers, and in addition thereto Congress with the laws that have been on the books continually not only the case law that they have not repudiated but the intention of the Congress as it has written these laws, taking into consideration the decisions from the case law, have certainly indicated their intention of continuing the Federal jurisdiction over the Indians who stay on the reservations, and that the opening up of the territory to white settlement was just an attempt as this Court stated in Mattz supra:

> "of promoting interaction between the races and encouraging Indians to adopt white ways"

and as is also stated by this Court in Mattz supra, on Page 22:

> "Congress was fully aware of the means by which

termination could be effected"

and there has been no definite terminating of the Federal control.

Respectfully submitted,

L. R. GUSTAFSON
Britton, South Dakota 57430
Attorney for Respondents

APPENDIX 1

TREATY OF FEBRUARY 19, 1867, 15 STAT. 505

Whereas it is understood that a portion of the Sissiton and Warpeton bands of Santee Sioux Indians, numbering from twelve hundred to fifteen hundred persons, not only preserved their obligations to the Government of the United States, during and since the outbreak of the Medewakantons and other bands of Sioux in 1862, but freely perilled their lives during that outbreak to rescue the residents on the Sioux reservation, and to obtain possession of white women and children made captives by the hostile bands; and that another portion of said Sissiton and Warpeton bands, numbering from one thousand to twelve hundred persons, who did not participate in the massacre of the whites in 1862, fearing the indiscriminate vengeance of the whites, fled to the great prairies of the Northwest, where they still remain: and

Whereas Congress, in confiscating the Sioux annuities and reservations, made no provision for the support of these, the friendly portion of the Sissiton and Warpeton bands, and it is believed that they have been suffered to remain homeless wanderers, frequently subject to intense sufferings from want of subsistence and clothing to protect them from the rigors of a high northern latitude, although at all times prompt in rendering service when called upon to repel hostile raids and to punish depredations committed by hostile Indians upon the persons and property of the whites; and

Whereas the several subdivisions of the friendly Sissitons and Warpeton bands ask, through their repre-

sentatives, that their adherence to their former obligations of friendship to the Government and people of the United States be recognized, and that provision be made to enable them to return to an agricultural life and be relieved from a dependence upon the chase for a precarious subsistence: Therefore,

A treaty has been made and entered into, at Washington City, District of Columbia, this nineteenth day of February, A.D. 1867, by and between Lewis V. Bogy, Commissioner of Indian Affairs, and William H. Watson, commissioners, on the part of the United States, and the undersigned chiefs and head-men of the Sissiton and Warpeton bands of Dakota or Sioux Indians, as follows, to wit:

Article 1. The Sissiton and Warpeton bands of Dakota Sioux Indians, represented in council, will continue their friendly relations with the Government and people of the United States, and bind themselves individually and collectively to use their influence to the extent of their ability to prevent other bands of Dakota or other adjacent tribes from making hostile demonstrations against the Government or people of the United States.

Article 2. The said bands hereby cede to the United States the right to construct wagon-roads, railroads, mail stations, telegraph lines, and such other public improvements as the interest of the Government may require, over and across the lands claimed by said bands, (including their reservation as hereinafter designated) over any route or routes that may be selected by the authority of the Government, said lands so claimed being bounded on the south and east by the treaty-line of 1851, and the Red River of the North to the mouth of

Goose River; on the north by the Goose River and a line running from the source thereof by the most westerly point of Devil's Lake to the Chief's Bluff at the head of James River, and on the west by the James River to the mouth of Mocasin River, and thence to Kampeska Lake.

Article 3. For and in consideration of the cession above mentioned, and in consideration of the faithful and important services said to have been rendered by the friendly bands of Sissitons and Warpetons Sioux here represented, and also in consideration of the confiscation of all their annuities, reservations, and improvements, it is agreed that there shall be set apart for the members of said bands who have heretofore surrendered to the authorities of the Government, and were not sent to the Crow Creek reservation, and for the members of said bands who were released from prison in 1866, the following-described lands as a permanent revision, viz:

Beginning at the head of Lake Travers[e], and thence along the treaty-line of the treaty of 1851 to Kampeska Lake; thence in a direct line to Reipan or the northeast point of the Coteau des Prairie[s], and thence passing north of Skunk Lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty-line of 1851 to the place of beginning.

Article 4. It is further agreed that a reservation be set apart for all other members of said bands who were not sent to the Crow Creek reservation, and also for the Cut-Head bands of Yanktonais Sioux, a reservation bounded as follows, viz:

Beginning at the most easterly point of Devil's Lake; thence along the waters of said lake to the most westerly point of the same; thence on a direct line to the nearest

point on the Cheyenne River; thence down said river to a point opposite the lower end of Aspen Island, and thence on a direct line to the place of beginning.

Article 5. The said reservations shall be apportioned in tracts of (160) one hundred and sixty acres to each head of a family or single person over the age of (21) twenty-one years, belonging to said bands and entitled to locate thereon, who may desire to locate permanently and cultivate the soil as a means of subsistence: each (160) one hundred and sixty acres so allotted to be made to conform to the legal subdivisions of the Government surveys when such surveys shall have been made; and every person to whom lands may be allotted under the provisions of this article, who shall occupy and cultivate a portion thereof for five consecutive years shall thereafter be entitled to receive a patent for the same so soon as he shall have fity acres of said tract fenced, ploughed, and in crop: Provided, That said patent shall not authorize any transfer of said lands, or portions thereof, except to the United States, but said lands and the improvements thereon shall descend to the proper heirs of the persons obtaining a patent.

Article 6. And, further, in consideration of the destitution of said bands of Sissiton and Warpeton Sioux, parties hereto, resulting from the confiscation of their annuities and improvements, it is agreed that Congress will, in its own discretion, from time to time make such appropriations as may be deemed requisite to enable said Indians to return to an agricultural life under the system in operation on the Sioux reservation in 1862; including, if thought advisable, the establishment and support of local and manual-labor schools; the employment of

agricultural, mechanical, and other teachers; the opening and improvement of individual farms; and generally such objects as Congress in its wisdom shall deem necessary to promote the agricultural improvement and civilization of said bands.

Article 7. An agent shall be appointed for said bands, who shall be located at Lake Traverse; and whenever there shall be five hundred (500) persons of said bands permanently located upon the Devil's Lake reservation there shall be an agent or other competent person appointed to superintend at that place the agricultural, educational, and mechanical interests of said bands.

Article 8. All expenditures under the provisions of this treaty shall be made for the agricultural improvement and civilization of the members of said bands authorized to locate upon the respective reservations, as hereinbefore specified, in such manner as may be directed by law; but no goods, provisions, groceries, or other articles-except materials for the erection of houses and articles to facilitate the operations of agriculture-shall be issued to Indians or mixed-bloods on either reservation unless it be in payment for labor performed or for produce delivered: Provided, That when persons located on either reservation by reason of age, sickness, or deformity, are unable to labor, the agent may issue clothing and subsistence to such persons from such supplies as may be provided for said bands.

Article 9. The withdrawal of the Indians from all dependence upon the chase as a means of subsistence being necessary to the adoption of civilized habits among them, it is desirable that no encouragement be afforded them to continue their hunting operations as means of

support, and, therefore, it is agreed that no person will be authorized to trade for furs or peltries within the limits of the land claimed by said bands, as specified in the second article of this treaty, it being contemplated that the Indians will rely solely upon agricultural and mechanical labor for subsistence, and that the agent will supply the Indians and mixed-bloods on the respective reservations with clothing, provisions, &c., as set forth in article eight, so soon as the same shall be provided for that purpose. And it is further agreed that no person not a member of said bands, parties hereto whether white, mixed-blood, or Indian, except persons in the employ of the Government or located under its authority, shall be permitted to locate upon said lands, either for hunting, trapping, or agricultural purposes.

Article 10. The chiefs and head-men located upon either of the reservations set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: Provided, That all rules, regulations, or law adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent.

In testimony whereof, we, the commissioners representing the United States, and the delegates representing the Sissiton and Warpeton bands of Sioux Indians, have

hereunto set our hands and seals, at the place and on the day and year above written.

LEWIS V. BOGY,
Commissioner of Indian Affairs.
W. H. WATSON.

APPENDIX 2

Act of March 3, 1891, 26 Stat. 1035.

SEC. 26. That the following agreement entered into on behalf of the United States by Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, commissioners on the part of the United States, on the twelfth day of December, eighteen hundred and eighty-nine, with the Sisseton and Wahpeton bands of Dakota or Sioux Indians now on file in the Department of the Interior, signed by said commissioners for the United States, and for said Indians by Simon Ananangmari and others, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

"Whereas, by section five of the act of Congress entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, it is provided 'That at any time after lands have been allotted to all the Indian of any tribe, as herein provided, or sooner,' if in the opinion of the President it

shall be fore the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by the said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservations not allotted as such tribe shall from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress: and the form and manner of executing such release shall also be prescribed by Congress.

Whereas the Sisseton and Wahpeton bands of Dakota or Sioux Indians are desirous of disposing of a portion of the land set apart and reserved to them by the third article of the treaty of February nineteenth, eighteen hundred and sixty-seven, between them and the United States, and situated partly in the State of North Dakota and partly in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the Act of Congress approved February eighth, eighteen hundred and eighty-seven, aforesaid, at the Sisseton Agency South Dakota, on this the twelfth day of December, eighteen hundred and eighty-nine, by and between Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, on the part of the United States, duly authorized and empowered thereto, and the chiefs, head-men, and male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, witnesseth:

ARTICLE I.

The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the sum of two dollars and fifty cents per acre for each and every acre thereof, and it is agreed by the parties hereto that the sum so to be paid shall be held in the Treasury of the United States for the sole use and benefit of the said bands of Indians; and the same, with interest thereon at three per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of the said bands of Indians, or members thereof, as provided in section five of an act of Congress, approved February eighth, eighteen hundred and eighty-seven, and entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for

other purposes:" Provided, That any religious society or other organization now occupying, under proper authority, for religious or educational work among the Indians, any of the land in this agreement ceded, sold, relinquished, and conveyed shall have the right, for two years from the date of the ratification of this instrument, within which to purchase the lands so occupied at a price to be fixed by the Congress of the United States: Provided further, That the cession sale, relinquishment, and conveyance of the lands described in article one of this agreement shall not take effect and be in force until the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand four hundred dollars, shall have been paid to said bands of Indians, as set forth and stipulated in article third of this agreement.

ARTICLE III.

The United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty seven cents, being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people, when at war with the United States, and their families and descendants, under the provisions of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, and of which they have been wrongfully and unjustly deprived

by the operation of the provisions of an act of Congress approved February sixteenth, eighteen hundred and sixty-three, and entitled "An act for the relief of persons for damages sustained by reason of depredation, and injuries by certain bands of Sioux Indians"; said sum being at the rate of eighteen thousand four hundred dollars per annum from July first, eighteen hundred and sixty-two, to July first, eighteen hundred and eighty-eight less their pro rata share of the sum of six hundred and sixteen thousand and eighty-six dollars and fifty-two cents, heretofore appropriated for the benefit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians, as set forth in report numbered nineteen hundred and fifty-three, of the House of Representatives, Fiftieth Congress, first session.

The United States further agrees to pay to said bands of Indians, per capita, the sum of eighteen thousand and four hundred dollars annually from the first day of July, eighteen hundred and eighty-eight, to the first day of July, nineteen hundred and one, the latter date being the period at which the annuities to said bands of Indians were to cease, under the terms of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, aforesaid; and it is hereby further stipulated and agreed that the aforesaid sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, due the first day of July, eighteen hundred and eighty-nine, shall become immediately available upon the ratification of this agreement.

ARTICLE IV.

It is further stipulated and agreed that there shall be allotted to each individual member of the bands of Indians, parties hereto, a sufficient quantity, which, with the lands heretofore allotted, shall make in each case one hundred and sixty acres, and in case no allotment has been made to any individual member of said bands, then an allotment of one hundred and sixty acres shall be made to such individual, the object of this article being to equalize the allotments among the members of said bands, so that each individual, including married women, shall have one hundred and sixty acres of land; and patents shall issue for the lands allotted in pursuance of the provisions of this article, upon the same terms and conditions and limitations as is provided in section five of the act of Congress, approved February eighth, eighteen hundred and eighty-seven, hereinbefore referred to.

ARTICLE V.

The agreement concluded with the said Sisseton and Wahpeton bands of Dakota or Sioux Indians, on the eighth day of December, eighteen hundred and eighty-four, granting a right of way through their reservation for the Chicago, Milwaukee and Saint Paul Railway, is hereby accepted, ratified and confirmed.

ARTICLE VI.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof we have hereunto set our hands and seals the day and year above written.

ELIPHALET WHITTLESEY,
D. W. DIGGS,
CHAS. A. MAXWELL,
On the part of the United States.

The foregoing articles of agreement having been fully explained to us, in open council, we, the undersigned, being male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, do hereby consent and agree to all the stipulations, conditions, and provisions therein contained.

Simon Ananangmari (his x mark), and others

SEC. 27. That for the purpose of carrying out the terms and provisions of said agreement there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated the sum of two million two hundred and three thousand dollars, of which amount the sum of five hundred and three thousand two hundred dollars shall be immediately available, and the same, or so much thereof as may be necessary, shall be paid as follows, to wit: To the Sisseton and Wahpeton Indians, parties to this agreement, the sum of three hundred and seventy-six thousand five hundred and seventy-eight dollars and thirty-seven cents, said amount to be distributed per capita. To the scouts and soldiers of

the Sisseton, Wahpeton, Medawakanton, and Wapakoota bands of Sioux Indians, who were enrolled and entered into the military service of the United States and served in suppressing what is known as the "Sioux outbreak of eighteen hundred and sixty-two:" or those who were enrolled and served in the armies of the United States in the war of the rebellion, and to the members of their families and descendants, now living, of such scouts and soldiers as are dead, who are not included in the foregoing class, as parties to said agreement, the sum of one hundred and twenty-six thousand six hundred and twenty dollars, said amount to be distributed per capita; and the said sum of five hundred and three thousand and two hundred dollars or so much thereof as may be necessary, when paid to the said Sisseton, Wahpeton, Medowakanton, and Wahpakoota bands of Sioux Indians, their families and descendants, designated in this act, shall be deemed a full settlement of all claims they may have for unpaid annuities, under any and all treaties or Acts of Congress up to the thirtieth day of June, eighteen hundred and ninety; Provided however, That all contracts or agreements between said Indians or any of them, and agents, attorneys, or other persons for the payment of any part of this appropriation for or on account of fees or compensation to said agents, attorneys or other persons, unless the same have been made, as provided by law, and are yet in force and have been approved by the Department of the Interior, or have been made by and between citizens of the United States are hereby declared null and void, and in such cases the Secretary of the Interior shall cause all moneys herein appropriated to be paid directly to the said Indians and shall pay no portion

of the same, to their said agents or attorneys. And in no event shall a sum exceeding ten per cent be paid to any agent or attorney, and the balance, after deducting the said five hundred and three thousand two hundred dollars, to wit, the sum of one million six hundred and ninety-nine thousand eight hundred dollars, or so much thereof as may be necessary, to pay for lands by said agreement ceded, sold, relinquished, and conveyed at the rate of two dollars and fifty cents per acre, shall be placed in the Treasury of the United States, to the credit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians (parties to said agreement), and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress or to application by order of the President for the education and civilization of said bands of Indians or members thereof.

SEC. 28. That any religious society or other organization now occupying under proper authority any of the lands by said agreement ceded, sold, relinquished, and conveyed shall have the right for a period of two years from the date hereof, within which to purchase the lands so occupied not exceeding one hundred and sixty acres in any one tract at the price paid therefor by the United States under said agreement.

SEC. 29. That in order to further carry out the provisions of said agreement and of this act, the Secretary of the Interior is authorized and directed, as soon as practicable, to cause the additional allotment provided for in said agreement to be made in the manner and form as provided in an act entitled "An act to provide for the allotments of lands in severalty to Indians on the various

reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes," and as provided in any existing amendments of said act, approved February eighth, eighteen hundred and eighty-seven, and to pay the sums hereinbefore made immediately available, first to the parties to said agreement, or their proper representatives, and to appoint suitable officers for such purposes who shall furnish bonds usual in such cases, and whose compensation and expenses shall be paid out of said available funds as the Secretary of the Interior shall direct, and whose lawful acts, when approved by him, shall be final and conclusive.

SEC. 30 That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located; Provided, That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same.

APPENDIX 3

USCA 18 # 1151

#1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, #25, 63 Stat. 94.

Historical and Revision Notes

Reviser's Note. Based on sections 548 and 549 of Title 18 and sections 212, 213, 215, 217, 218 of Title 25, Indians, U.S. Code, 1940 ed. (R.S. ## 2142, 2143, 2144, 2145, 2146; Feb. 18, 1875, c. 80, #1, 18 Stat. 318; Mar. 4, 1909, c. 321, ## 328, 329, 35 Stat. 1151 [derived from Mar. 3, 1885, c. 341, # 9, 23 Stat. 385; Jan. 15, 1897, c. 29, # 5, 29 Stat. 487; Feb. 2, 1903, c. 351, 32 Stat. 793]; Mar. 3, 1911, c. 231, # 291, 36 Stat. 1167; June 28, 1932, C. 284, 47 Stat. 337).

This section consolidates numerous conflicting and inconsistent provisions of law into a concise statement of the applicable law.

R.S. ## 2145, 2146 (U.S.C., Title 25, ## 217, 218) extended to the Indian country with notable exceptions the criminal laws of the United States applicable to places within the exclusive jurisdiction of the United States. Crimes of Indians against Indians, and crimes punishable by tribal law were excluded.

The confusion was not lessened by the cases of U.S. v. McBratney, 104 U.S. 622 and Draper v. U.S., 17 S.Ct. 107, holding that crimes in Indian country by persons not Indians are not cognizable by Federal courts in absence of reservation or cession of exclusive jurisdiction applicable to places within the exclusive jurisdiction of the United States. Because of numerous statutes applicable only to Indians and prescribing punishment for crimes committed by Indians against Indians, "Indian country" was defined but once. (See act June 30, 1834, c. 161, # 1, 4 Stat. 729, which was later repealed.)

Definition is based on latest construction of the term by the United States Supreme Court in U.S. v. McGowan, 58 S.Ct. 286, 302 U.S. 535, following U.S. v. Sandoval, 34 S.Ct. 1, 5, 231 U.S. 28, 46. (See also Donnelly v. U.S., 33 S.Ct. 449, 228 U.S. 243; and Kills Plenty v. U.S., 133 F.2d 292, certiorari denied, 1943, 63 S.Ct. 1172. (See reviser's note under section 1153 of this title.)

Indian allotments were included in the definition on authority of the case of U.S. v. Pelican 1913, 34 S.Ct. 396, 232 U.S. 442, 58 L.Ed. 676. 80th Congress House Report No. 304.

1949 Amendment. Act May 24, 1949 incorporated the

limitations of the term "Indian country" which are contained in sections 1154 and 1156 of this title.

Legislative History: For legislative history and purpose of Act May 24, 1949, see 1949 U.S. Code Cong. Service, p. 1248.

APPENDIX 4

SOUTH DAKOTA CONSTITUTION

ARTICLE XXII

COMPACT WITH THE UNITED STATES

CROSS-REFERENCES

Freedom of religion, Const., art. VI, # 3.
Indian country, jurisdiction, ## 1-1-12. to 1-1-21.
Public school system, Const., art. VIII; Title 13.

The following article shall be irrevocable without the consent of the United States and the people of the state of South Dakota expressed by their legislative assembly:

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That we, the people inhabiting the state of

South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by the state of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein shall preclude the state of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relation and has obtained from the United States, or from any person a title thereto by patent or other grant save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation. All such lands which may have been exempted by any grant or law of the United States, shall remain exempt to the extent, and as prescribed by such act of Congress.

Third. That the state of South Dakota shall assume and pay that portion of the debts and liabilities of the territory of Dakota as provided in this Constitution.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools,

which shall be open to all the children of this state, and free from sectarian control.

APPENDIX 5

HISTORY

1901 Session Laws, Chp. (H. B.) 106, Page 176

"CEDING JURISDICTION TO UNITED STATES OVER OFFENSES COMMITTED UPON INDIAN RESERVATIONS.

An Act Ceding to the United States of America Jurisdiction over Criminal Offenses Committed upon Indian Reservations Within the State of South Dakota.

Be it Enacted by the Legislature of the State of South Dakota:

Sec. 1. JURISDICTION GIVEN TO THE UNITED STATES.) There is hereby relinquished and given to the United States of America and the officers and courts thereof exclusive jurisdiction and authority to arrest, prosecute, convict and punish all persons whomsoever who shall, upon any Indian reservation within the State of South Dakota, commit any act in violation of the penal laws of the United States.

Sec. 2. COSTS NOT CHARGEABLE TO SOUTH DAKOTA.) No costs or charges incurred in the courts of

the United States in the prosecution of offenses committed upon any Indian reservation shall be chargeable to the State of South Dakota.

Sec. 3. TO TAKE EFFECT WHEN.) This act shall be in full force and effect, whenever the jurisdiction hereby relinquished shall be assumed by the United States.

Sec. 4. All acts and parts of acts in conflict with the provisions of this Act are hereby repealed."

Approved Feb. 14, 1901.

This appears in the 1903 Revised Code of South Dakota No. 8, Page 3, as follows:

"#8. There shall be given and relinquished to the United States and the officers and courts thereof exclusive jurisdiction and authority to arrest, prosecute, convict and punish all persons whomsoever who shall, upon any Indian reservation within the State of South Dakota, commit any act in violation of the penal laws of the United States, and no costs or charges incurred in the Courts of the United States in the prosecution of offenses committed upon any Indian Reservation shall be chargeable to the State of South Dakota. Provided, this section shall be in full force and effect whenever the jurisdiction hereby relinquished shall be assumed by the United States."

This becomes #5053, in our 1919 Code as follows:

"#5053. INDIAN RESERVATIONS. Exclusive jurisdiction and authority to arrest, prosecute, convict and punish all persons who shall commit any act in violation of the penal laws of the United States, upon any Indian Reservation within this state, shall be given and relinquished to the United States and the officers and Courts thereof, whenever such jurisdiction shall be assumed by the United States, but no costs or charges, incurred in the United States Courts, in the prosecution of offences commited upon any Indian Reservation, shall be chargeable to this state."

This was amended by Chapter 158, of the 1929 Session Laws, as follows:

"RELATING TO CRIMINAL JURISDICTION UPON

AN ACT Entitled, An Act to amend Section 5053 of the Revised 1919 Code of the State of South Dakota, Relative to Criminal Jurisdiction of the United States of America and the State of South Dakota upon Indian Reservations.

Be it Enacted by the Legislature of the State of South Dakota:

Section 1. That Section 5053 of the Revised 1919 Code of the State of South Dakota, relative to criminal jurisdiction of the United States of America and the State of South Dakota upon Indian Reservations be amended to read as follows:

Section 5053. INDIAN RESERVATIONS. Exclusive jurisdiction and authority to arrest, prosecute, convict and punish all persons who shall commit any act in violation of the penal laws of the United States, upon any Indian Reservation within this state, shall be given and relinquished to the United States and the officers and courts thereof, whenever such jurisdiction shall be assumed by the United States, but no costs or charges, incurred in the United States courts, in the prosecution of offences committed upon any Indian Reservation, shall be chargeable to this state, but whenever any of said acts committed by any person upon any Indian Reservation within this state shall constitute a crime under any law of the state of South Dakota, concurrent jurisdiction is hereby expressly reserved to the state of South Dakota, to arrest, prosecute, convict and punish any person committing any offense under the laws of the State of South Dakota, even though the acts constituting such offense may also constitute an offense under the laws of the United States of America.

Approved March 14, 1929."

This later became 34.0502 in the 1939 Code with changes, but Judge Wyman dis-regarded this part of the change, assumed jurisdiction as in the 1939 Code on concurrent jurisdiction, in the Kills Plenty Case:

"34.0502 INDIAN RESERVATIONS: JURISDICTION OF PERSONS COMMITTING CRIME: EXCLUSIVE FEDERAL. Exclusive jurisdiction and authority to arrest, prosecute, convict and punish all persons

who shall commit any act in violation of the penal laws of the United States upon any Indian reservation within this state shall be given and relinquished to the United States and the officers and courts thereof, whenever such jurisdiction shall be assumed by the United States, but no costs or charges, incurred in the United States Courts, in the prosecution of offenses committed upon any Indian reservation shall be chargeable to this state, but whenever any of said acts committed by any person upon any Indian Reservation within this state shall constitute a crime under any law of the state of South Dakota, concurrent jurisdiction is hereby expressly reserved to the State of South Dakota to arrest, prosecute, convict and punish any person committing any offense under the laws of the state of South Dakota even though the acts constituting such offense may also constitute an offense under the laws of the United States of America.

Whenever the United States has assumed jurisdiction to arrest, prosecute, convict, and punish all persons who shall commit any act in violation of the penal laws of the United States upon any Indian Reservation within this state, as a result of this cession of such jurisdiction by the state of South Dakota, and shall later relinquish such assumed jurisdiction, such jurisdiction shall revert to the State of South Dakota, and this section shall operate to accept the relinquishment by the United States of jurisdiction over persons other than Indians for the commission of crimes upon Indian reservations contained in 18 United States Code Annotated, section 1153, and to reinvest such jurisdiction in the state of South Dakota.

In the absence of treaty or statute of the United

States, the state of South Dakota shall have jurisdiction to arrest, prosecute, convict, and punish any person committing any offense under the laws of the State of South Dakota, on any Indian reservation or in the Indian Country."

In 1951, by Chapter 187; which went into 34.0502:

"Section 1. That SDC 34.0502 be, and the same is hereby Amended to read as follows:

34.0502 Exclusive jurisdiction and authority to arrest, prosecute, convict, and punish all persons who shall commit any act in violation of the penal laws of the United States upon any Indian Reservation within this state shall be given and relinquished to the United States and the officers and courts thereof, whenever such jurisdiction shall be assumed by the United States, but no costs or charges, incurred in the United States Courts, in the prosecution of offenses committed upon any Indian Reservation shall be chargeable to this state, but whenever any of said acts committed by any person upon any Indian Reservation within this state shall constitute a crime under any law of the state of South Dakota, concurrent jurisdiction is hereby expressly reserved to the State of South Dakota to arrest, prosecute, convict, and punish any person committing any offense under the laws of the state of South Dakota even though the acts constituting such offense may also constitute an offense under the laws of the United States of America.

Whenever the United States has assumed jurisdiction to arrest, prosecute, convict, and punish all persons who shall commit any act in violation of the penal laws of the United States upon any Indian Reservation within this state, as a result of this cession of such jurisdiction by the state of South Dakota, and shall later relinquish such assumed jurisdiction, such jurisdiction shall revert to the state of South Dakota, and this act shall operate to accept the relinquishment by the United States of jurisdiction over persons other than Indians for the commission of crimes upon Indian Reservations contained in 18 United States Code Annotated, Section 1153, and to reinvest such jurisdiction in the state of South Dakota.

In the Absence of treaty or statute of the United States, the state of South Dakota shall have jurisdiction to arrest, prosecute, convict, and punish any person committing any offense under the laws of the state of South Dakota, on any Indian Reservation or in the Indian country."

Part of this section 34.0502, is now 23-9-4, and this is the same as in the 1901 Session Laws.

"23-9-4. Exclusive jurisdiction over federal crimes on Indian reservation–Relinquishment by South Dakota.– Exclusive jurisdiction and authority to arrest, prosecute, convict, and punish all persons who shall commit any act in violation of the penal laws of the United States upon any Indian reservation within this state shall be given and relinquished to the United States and the officers and

courts thereof, whenever such jurisdiction shall be assumed by the United States."

"23-9-9. State jurisdiction of state crimes in Indian country.—In the absence of treaty or statute of the United States, the state of South Dakota shall have jurisdiction to arrest, prosecute, convict, and punish any person committing any offense under the laws of the state of South Dakota on any Indian reservation or in the Indian country.

APPENDIX 6

USCA 18 # 3242

#3242. Indians committing certain offenses; acts on reservations

All Indians committing any of the following offenses; namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within the Indian country shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States. June 25, 1948, c. 645, 62 Stat. 827; May 24, 1949, c. 139, # 51, 63 Stat. 96; Nov. 2, 1966, Pub.L. 89-707, # 2, 80 Stat. 1101.

Historical and Revision Notes

Reviser's Note. Based on Title 18, U.S.C., 1940 ed., # 548 (Mar. 4, 1909, c. 321, # 328, 35 Stat. 1151; June 28, 1932, c. 284, 47 Stat. 337 [Derived from Acts March 3, 1885, c. 341, # 9, 23 Stat. 385; Jan. 15, 1897, c. 29, # 5, 29 Stat. 487]).

The provisions defining rape in accordance with the law of the State and prescribing imprisonment at the discretion of the court for rape by an Indian upon an Indian are now included in section 1153 of this title. (See also section 6 of this title.)

Section 549 of said Title 18, relating to crimes in Indian reservations in South Dakota, was omitted as covered by section 1153 of this title. Accordingly the last sentence of said section 548, extending this section to prosecutions of Indians in South Dakota, was also omitted as unnecessary because this section is sufficient and applicable. Other provisions of said section 548 are incorporated in sections 1151 and 1153 of this title.

Minor changes were made in phraseology. 80th Congress House Report No. 304.

1966 Amendment. Pub.L. 89-707 added carnal knowledge and assault with intent to commit rape as offenses cognizable within the exclusive jurisdiction of the United States when committed on and within the Indian country.

1949 Amendment. Act May 24, 1949, substituted "within the Indian country" for "within any Indian reservation, including rights-of-way running through the reservation,".

Legislative History. For legislative history and purpose of Act May 24, 1949, see 1949 U.S. Code Cong. Service, p. 1248. See, also, Pub.L. 89-707, 1966 U.S. Code Cong. and Adm. News, p. 3653.

APPENDIX 7

April 11, 1892; Stat. 1017

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA: A PROCLAMATION.

Whereas, by the third article of the treaty between the United States of America and the Sisseton and Wahpeton bands of Dakota or Sioux Indians, concluded February 19, 1867, proclaimed May 2, 1867 (15 U.S. Statutes, p. 505, the United States set apart and reserved for certain of said Indians certain lands, particularly described, being situated partly in North Dakota and partly in South Dakota, and known as the Lake Traverse Reservation; and

Whereas, by agreement made with said Indians residing on said reservation, dated December 12, 1889, they conveyed, as set forth in article one thereof, to the United States, all their title and interest in and to all the unallotted lands within the limits of the reservation set apart as aforesaid remaining after the allotments shall have been made, which are provided for in article four of the agreement, as follows: "that there shall be allotted to each individual member of the bands of Indians, parties hereto, a sufficient quantity, which, with the lands

heretofore allotted, shall make in each case one hundred and sixty acres, and in case no allotment has been made to any individual member of said bands, then an allotment of one hundred and sixty acres shall be made to such individual"; and

Whereas, it is provided in article two of said agreement, "That the cession, sale, relinquishment, and conveyance of the lands described in article one of this agreement shall not take effect and be in force until the sum of $342,778.37, together with the sum of $18,400, shall have been paid to said bands of Indians, as set forth and stipulated in article third of this agreement"; and

Whereas, it is provided in the act of Congress approved March 3, 1891 (26 U.S. Statutes, pp. 1036-1038, Sec. 30), accepting and ratifying the agreement with said Indians:

"That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located: Provided, That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly

paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same," and

Whereas, Payment as required by said act, has been made by the United States; and

Whereas, Allotments as provided for in said agreement, as now appears by the records of the Department of the Interior will ha e been made, approved, and completed, and all other terms and considerations required will have been complied with on the day and hour hereinafter fixed for opening said lands to settlement.

Now, therefore, I, Benjamin Harrison, President of the United States, do hereby declare and make known that all of the lands embraced in said reservation, saving and excepting the lands reserved for and allotted to said Indians, and the lands reserved for other purposes in pursuance of the provisions of said agreement and the said act of Congress ratifying the same and other, the laws relating thereto will, at and after the hour of twelve o'clock noon (central standard time) on the fifteenth day of April, A.D. eighteen hundred and ninety-two, and not before, be opened to settlement under the terms of and subject to all the terms and conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, and the laws of the United States applicable thereto.

The lands to be opened for settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of lands within the Lake Traverse Reservation opened to settlement by proclamation of the President dated April 11, 1892," and which schedule is made a part hereof.

Warning, moreover, is hereby given that until said lands are opened to settlement as herein provided, all persons, save said Indians, are forbidden to enter upon and occupy the same or any part thereof.

And further notice is hereby given that it has been duly ordered that the lands mentioned and included in this Proclamation shall be, and the same are attached to the Fargo and Watertown land districts, in said States, as follows:

1. All that portion of the Lake Traverse Reservation, commencing at the northwest corner of said reservation; thence south 12 degrees 2 minutes west, following the west boundary of the reservation to the new seventh standard parallel, or boundary line between the States of North and South Dakota; thence east, following the new seventh standard parallel to its intersection with the north boundary of said Indian reservation; thence northwesterly with said boundary to the place of beginning, is attached to the Fargo land district, the office of which is now located at Fargo, North Dakota.

2. All that portion of the Lake Traverse Reservation, commencing at a point where the new seventh standard parallel intersects the west boundary of said reservation; thence southerly along the west boundary of said reservation to its extreme southern limit; thence northerly along the east boundary of said reservation to Lake Traverse; thence north with said lake to the northeast corner of the Lake Traverse Indian Reservation; thence westerly with the north boundary of said reservation to its intersection with the new seventh standard

parallel, or boundary line between the States of North and South Dakota; thence with the new seventh standard parallel to the place of beginning, is attached to the Watertown land district, the office of which is now located at Watertown, South Dakota.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this eleventh day of April, in the year of our Lord one thousand eight hundred and ninety-two, and of the independence of the United States the one hundred and sixteenth.

BENJ. HARRISON

By the President:
JAMES G. BLAINE
Secretary of State.

APPENDIX 8

4/7/1992
Ex #1
James Gravelle

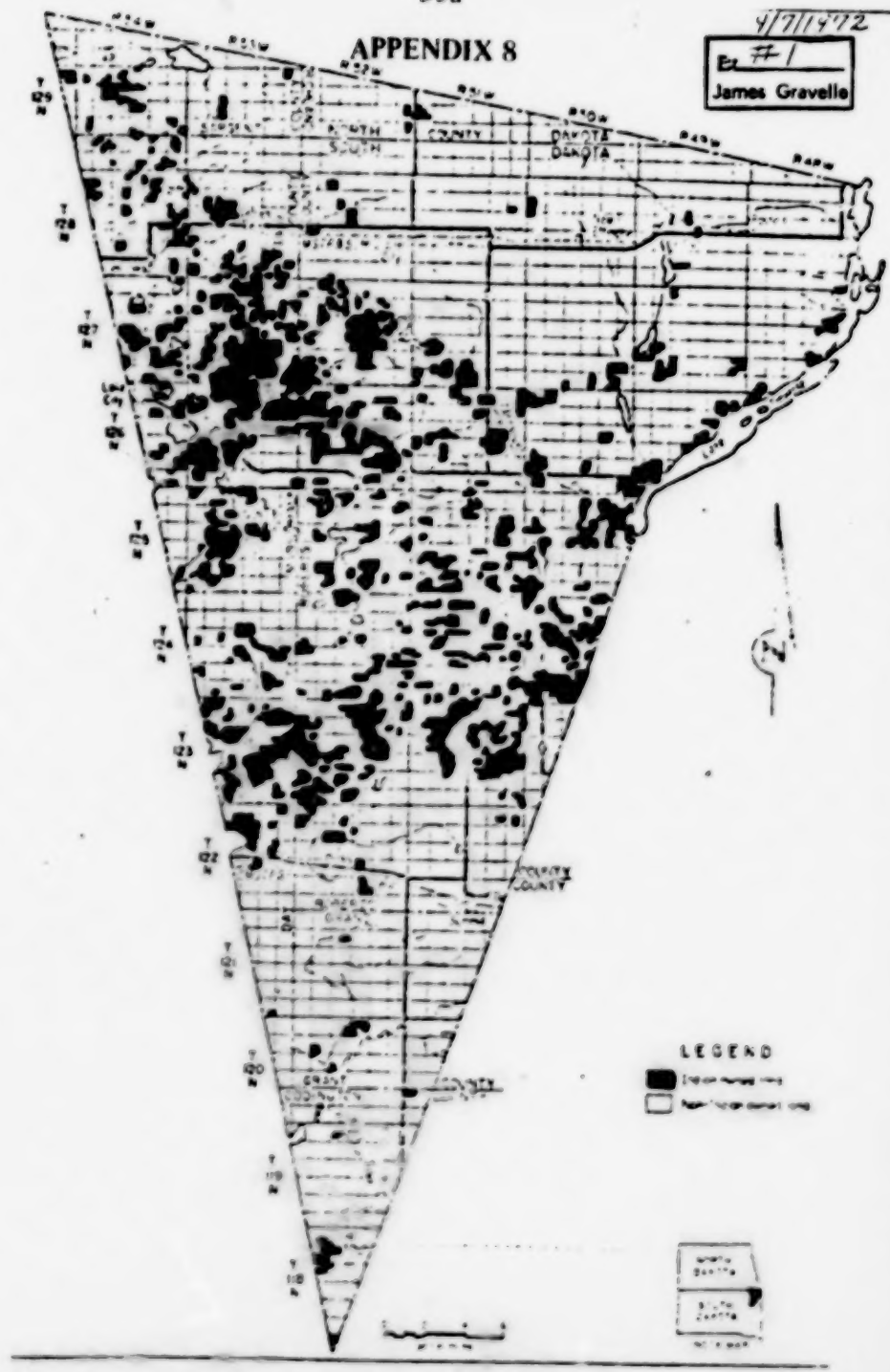

FIGURE 1. – Land Status, S[illegible]sseton[illegible]apeton Reservation, South Dakota. (Adapted from Bureau of Indian Affairs land status map.)

Supreme Court, U. S.
FILED
AUG 27 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1500

DON R. ERICKSON, WARDEN, *Petitioner*,

v.

ROBERT LEE FEATHER, ET AL., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR SISSETON-WAHPETON SIOUX TRIBE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

THOMAS L. SMITHSON
JOHN E. ECHOHAWK
JOHN D. ROSS, III
1506 Broadway
Boulder, Colorado 80302
Counsel for Amicus Curiae

Of Counsel:

NATIVE AMERICAN RIGHTS FUND

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BRIEF FOR SISSETON-WAHPETON SIOUX TRIBE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation files the following brief amicus curiae with the consent of Petitioner Don R. Erickson and Respondents Robert Lee Feather, et al. Written consents of both parties, by letter, are on file with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The Sisseton-Wahpeton Sioux Tribe files this brief amicus curiae in the interest of preservation of the existence of the Tribe. By urging affirmance of the decision of the United States Court of Appeals for the Eighth Circuit herein, the Tribe seeks to protect the territorial integrity of the Lake Traverse Reservation as established by the Treaty of February 19, 1867, 15 Stat. 505. The Tribe further seeks to assert and defend the jurisdiction of tribal and federal courts over civil and criminal causes of action to which Indians are parties arising within the original and present exterior boundaries of the Lake Traverse Reservation.

ARGUMENT

> These Indian Tribes are the wards of the Nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

Thus spoke the United States Supreme Court in *United States* v. *Kagama*, 118 U.S. 375, 383, 384 (1886) in sustaining the power of Congress to assume jurisdiction over major crimes between Indians against the contention that state law was applicable.

The Sisseton-Wahpeton Sioux Tribe is prepared to extend the hand of inter-governmental cooperation to the State of South Dakota and its political subdivisions which overlap the Lake Traverse Reservation. The State of South Dakota and its political subdivisions

have demonstrated no reciprocal respect for the Sisseton-Wahpeton Sioux Tribe. During periods of recent history when tribal governments were weakened and demoralized by federal policies and inadequate funding, the response of South Dakota and the counties within the Lake Traverse Reservation has been to assert jurisdiction of the state over Indians within Indian country by default. The results have been discriminatory and inadequate police protection and law enforcement, challenges to the sovereign right of the Tribe to regulate hunting and fishing within its boundaries, and the genocidal practice of the taking away of Indian children by the arrogant application in state court, of alien child welfare standards and the willful disregard of tribal custom and tradition in the care of children. In short, the State and its subdivisions have chosen to be the enemy of the Sisseton-Wahpeton Sioux Tribe, and their attacks upon the Tribe's sovereignty and territorial integrity must be repulsed in this Court.

The Sisseton-Wahpeton Sioux Tribe has always possessed jurisdiction over criminal and civil actions involving Indians within the Lake Traverse Reservation, to the exclusion of the courts of South Dakota. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832). The Tribe has always insisted that its territory included all lands within the original exterior boundaries of the Lake Traverse Reservation. The Tribe did not consent to the "disestablishment" or "diminishment" of its reservation by the United States. Nor did the Tribe, by agreeing to the sale of certain unallotted lands to non-Indian homesteaders, agree and consent to the diminishment of tribal jurisdiction and sovereignty within the exterior boundaries of the Lake Traverse Reservation. Nor, the Tribe contends, did the Congress of the

United States, by explicit, positive, enactment reduce the size of the Lake Traverse Reservation, nor alter its boundaries, nor diminish the inherent criminal and civil jurisdiction of the Tribe within that reservation.

The Sisseton-Wahpeton Sioux Tribe now exercises the full range of civil and criminal power delegated to the Tribe and its courts by the people. With nearly $90,000 of funds provided by the Law Enforcement Assistance Administration and by the Tribe with shared revenues from the United States the Tribe maintains a police department which includes Chief, Lieutenant, Sargeant, seven patrolmen, and five police vehicles. The Tribal Court consist of a Chief Judge and an Associate Judge. The Court has the assistance of a probation and parole officer and two assistants who deal with both adult offenders and juvenile matters. The Tribe presently houses its prisoners in the Roberts County jail under a contract with that county. Completion of a courthouse and jail complex, also funded by the Law Enforcement Assistance Administration, is contemplated by the end of the year. Both police and court personnel participate in ongoing training programs.

Tribal and federal law enforcement within the exterior boundaries of the Lake Traverse Reservation will solve the problem of "checkerboard" jurisdiction which is the result of the position for which the State contends. The Court of Appeals decision avoids the practical problem of platbook police patrols and inadequate protection of the public safety.

The State has not acquired civil or criminal jurisdiction within the reservation by the action required pursuant to Public Law 280, 67 Stat. 588, as amended. *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973); *Kennerly* v. *Montana District Court*, 400 U.S. 423 (1971); *Williams* v. *Lee*, 358 U.S. 217 (1959); *Annis* v. *Dewey County Bank*, 335 F.Supp. 133 (D. S.D. 1971). Nor has the United States Congress terminated the government of the Sisseton-Wahpeton Sioux Tribe. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). Congress has not vacated and restored Indian lands within the Lake Traverse Reservation to the public domain, nor has it redrawn the boundaries of that reservation. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

This Court has ruled that when "Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States* v. *Celestine*, 215 U.S. 278, 285 (1909). The Court has also been vigilant to protect powers of tribal self-government, stating that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945); *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164, 168 (1973).

This Court has labored on two occasions to lay down the principles by which state courts and lower federal courts might decide cases in which it is asserted that Indian reservations have been diminished. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, 412 U.S. 481 (1973). The United States Court of Appeals for the Eighth Circuit has applied the teachings of these cases obediently and accurately to those cases which have come before it. *Beardslee* v. *United States*, 387 F.2d 280 (8th Cir. 1967); *City of New Town, N.D.* v. *United States*, 454 F.2d 121 (8th Cir. 1972); *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (8th

Cir. 1973), cited with approval, *Mattz* v. *Arnett*, 412 U.S. 481, 497 n. 19 (1973); *United States ex rel. Feather* v. *Erickson*, 489 F.2d 99 (8th Cir. 1973). The State of South Dakota refuses to accept these authoritative pronouncements. The principles set forth in those cases are clear. Their application to the case at bar is imperative. Their application to this case is essential to the preservation of the Sisseton-Wahpeton Sioux Tribe.

CONCLUSION

The Sisseton-Wahpeton Sioux Tribe commends to the Court's attention the Brief for the Petitioner in the companion case of *Decoteau* v. *District County Court for the Tenth Judicial District*, Docket No. 73-1148. The principles and argument set forth therein justify summary disposition of these cases. Accordingly, the Tribe respectfully urges that this Court summarily affirm the judgment of the United States Court of Appeals for the Eighth Circuit in No. 73-1500 and summarily reverse the judgment of the Supreme Court of South Dakota in No. 73-1148.

Respectfully submitted,

THOMAS L. SMITHSON
JOHN E. ECHOHAWK
JOHN D. ROSS, III
1506 Broadway
Boulder, Colorado 80302
Counsel for Amicus Curiae

Of Counsel:

NATIVE AMERICAN RIGHTS FUND

August 26, 1974.

MOTION FILED
AUG 28 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1500

DON R. ERICKSON, Warden, South Dakota State Penitentiary,
Petitioner,

v.

United States of America ex rel. JOHN LEE FEATHER,
United States of America ex rel. LAVERNE BLACK THUNDER,
United States of America ex rel. AMBROSE ST. JOHN,
United States of America ex rel. JAMES R. KEEBLE,
United States of America ex rel. CURTIS SMALL,
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United States of America ex rel. JOSEPH DAY,
United States of America ex rel. ARNOLD LAFROMBOISE,
United States of America ex rel. CLARENCE WALKER,
United States of America ex rel. THEODORE DUANE WYNDE,
Respondents.

[redacted] BRIEF AMICI CURIAE OF ARAPAHOE TRIBE OF WIND RIVER RESERVATION, WYOMING, THREE AFFILIATED TRIBES OF FORT BERTHOLD RESERVATION, NORTH DAKOTA, AND CONFEDERATED SALISH AND KOOTENAI TRIBES OF FLATHEAD RESERVATION, MONTANA

GLEN A. WILKINSON
Counsel for Arapahoe Tribe
1735 New York Avenue, N.W.
Washington, D. C. 20006

JERRY C. STRAUS
Counsel for Three Affiliated Tribes
1735 New York Avenue, N.W.
Washington, D. C. 20006

RICHARD A. BAENEN
Counsel for Confederated Salish and Kootenai Tribes
1735 New York Avenue, N.W.
Washington, D. C. 20006

WILKINSON, CRAGUN & BARKER
ALAN I. RUBINSTEIN
Of Counsel

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IN THE

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United States of America ex rel. CLARENCE WALKER,
United States of America ex rel. THEODORE DUANE WYNDE,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Arapahoe Tribe of the Wind River Reservation, Wyoming, the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, and the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana respectfully move this Court for leave to file the accompanying brief, as *amici curiae*, in support of the position of respondents in the above-entitled cause and, of natural consequence, the position of petitioner in *DeCoteau* v. *District County Court*, No. 73-1148.

In support of this motion, your *amici* state that their interests in these cases are set forth in the accompanying brief. The Tribes have sought and received the consent of the parties they support for the filing of this attached brief *amici curiae*. The Attorney General of the State of South Dakota has refused to grant such consent.

We believe that the attached brief will assist this Court in its consideration of this important area of Indian law in general, and the proper construction of the Lake Traverse settlement statute in particular.

Respectfully submitted,

GLEN A. WILKINSON
Counsel for Arapahoe Tribe, Wyoming

JERRY C. STRAUS
Counsel for Three Affiliated Tribes, North Dakota

RICHARD A. BAENEN
Counsel for Confederated Salish and Kootenai Tribes, Montana

WILKINSON, CRAGUN & BARKER
ALAN I. RUBINSTEIN
Of Counsel

August, 1974

IN THE
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OCTOBER TERM, 1974

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BRIEF AMICI CURIAE OF ARAPAHOE TRIBE OF WIND RIVER RESERVATION, WYOMING, THREE AFFILIATED TRIBES OF FORT BERTHOLD RESERVATION, NORTH DAKOTA, AND CONFEDERATED SALISH AND KOOTENAI TRIBES OF FLATHEAD RESERVATION, MONTANA

STATEMENT OF INTEREST

The tribal entities filing this motion, as *amici curiae*, are all federally recognized Indian tribes who reside

and govern their members on three reservations, all of which have been previously subjected to acts of Congress opening certain portions of the reservations to settlement by non-Indians.[1]

The question of what effect a "settlement statute" may have had upon the traditional boundaries of an Indian reservation, and upon the ability of an Indian tribe to exercise jurisdiction over the property and inhabitants of that reservation, is important to all American Indians, and has special significance for those Indian tribes, such as your *amici* herein, whose reservations have been opened to settlement.

While we strongly support the position of respondent Indians of the Lake Traverse Reservation, we believe that there are significant distinctions between the statute which opened the Lake Traverse Reservation to settlement and the statutes which opened the Fort Berthold, Flathead, and Wind River Reservations to settlement by non-Indians.

We feel that it is essential for the Court to have these distinctions in mind, which distinctions have not yet been developed by any existing party to this litigation, in the event the Court does not adopt the position of respondent Indians in this case.

I. RULES OF STATUTORY CONSTRUCTION GENERALLY APPLICABLE TO SETTLEMENT STATUTES.

The focal point of the *Feather* case is the so-called settlement statute (*i.e.*, Act of March 3, 1891, 26 Stat. 989, 1035), which was enacted by Congress admittedly

[1] Fort Berthold Reservation, North Dakota: Act of June 1, 1910, 36 Stat. 455. Wind River Reservation, Wyoming: Act of March 3, 1905, 33 Stat. 1016. Flathead Reservation, Montana: Act of April 23, 1904, 33 Stat. 302.

for the purpose of opening the Lake Traverse Indian Reservation to white settlement. The issue in suit is whether the lands so opened retained the status of an Indian reservation following the implementation of that Act. We are guided by certain fundamental principles previously developed by this Court for application in cases such as *Feather*. For example, we know that once Congress has established an Indian reservation, all tracts remain a part of that reservation until separated therefrom by Congress. *United States* v. *Celestine*, 215 U.S. 278 (1909). We know that the opening of a reservation for homestead settlement is not at all inconsistent with its continued existence as a reservation. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962). We know too that the intent to abrogate treaty rights is not lightly imputed to Congress, *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), and that the principle of Indian freedom from state jurisdiction is well rooted in our history, *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164 (1973); therefore, Congressional intent to disestablish a reservation must either be expressed on the face of the settlement act, or, where the terms of the act are ambiguous, be clearly discernible from the surrounding circumstances and legislative history. *Mattz* v. *Arnett*, 412 U.S. 481 (1973). Thus, it is clear that the reviewing court, in order to determine the proper effect of a settlement statute, must look first to the actual language of the statute and then, if necessary, to its legislative history, the circumstances surrounding its enactment, and its subsequent Congressional and administrative history.

For purposes of this argument, your *amici* will briefly review the various kinds of settlement statutes, categorizing each according to language, and will then briefly review the significant circumstances surrounding the enactment of the Lake Traverse statute, Act of March 3, 1891, 26 Stat. 989, 1035.

II. ANALYSIS OF VARIOUS SETTLEMENT STATUTES ENACTED BY CONGRESS DURING THE PERIOD 1890-1910.

The various settlement statutes can be divided into five major categories: (1) *trust-settlement* statutes; (2) *express cession-in-trust* statutes; (3) *surplus land* statutes; (4) *cession* statutes; and (5) *termination* statutes.[2]

With respect to these categories, your *amici* submit that a *trust-settlement* statute is clear on its face, precluding a finding of disestablishment in the absence of express subsequent Congressional action to the contrary; that in cases of the second and third categories (*i.e.*, *express cession-in-trust* statutes; *surplus land* statutes) the statutes on their face raise a presumption against disestablishment, which presumption can only be rebutted by a preponderance of contrary evidence; that a *termination* statute on its face raises a presumption for disestablishment, which presumption can only be rebutted by a preponderance of evidence showing, on the basis of the legislative history and surrounding circumstances, that no disestablishment was actually intended; and that *cession* statutes are ambiguous, on their face, and therefore raise no presumption; rather, that the reviewing court must interpret the peculiar provisions of each *cession* statute in accordance with its legislative history and surrounding circumstances. For reasons which will be amplified later, your *amici* believe that the Lake Traverse statute falls into this latter category, raising

[2] The italicized name for each general category of settlement statute has been adopted throughout this brief for identification purposes only. Where we say, for example, that a court considered a *trust-settlement* statute in a particular case, it should be noted that the court did not necessarily identify the statute by that name. Such reference means only that the court considered a settlement statute with the specific characteristics which we list in this brief under the category of *trust-settlement* statutes.

no presumption for or against disestablishment, but that the terms of the statute, when viewed in light of its legislative history and surrounding circumstances, support the conclusion that the lands of the Sisseton and Wahpeton Indians remained in a state of continuing reservation following the enactment and implementation of the Act of March 3, 1891.

1. A *trust-settlement* statute, in our opinion, clearly and definitively supports a finding of continued reservation status. Such statutes are characterized by an absence of "cession, sale or relinquishment" terminology; rather, the lands described in the statute are to be surveyed and appraised, after which time the "surplus" or "unallotted" lands of the reservation are to be opened for settlement under the "homestead and town-site" laws of the United States, pursuant to Presidential Proclamation prescribing the time and the manner in which the lands may be settled or occupied.[3] The Indians receive the net proceeds of the settlement, allotments where appropriate, and other incidental benefits.[3a] In fact,

[3] Fort Berthold Indian Reservation, North Dakota: Act of June 1, 1910, 36 Stat. 455; Cheyenne River and Standing Rock Indian Reservation, South Dakota and North Dakota: Act of May 29, 1908, 35 Stat. 460; Colville Indian Reservation, Washington: Act of March 22, 1906, 34 Stat. 80; Flathead Indian Reservation, Montana: Act of April 23, 1904, 33 Stat. 302.

[3a] In most instances, *trust-settlement* statutes contain additional provisions which reserve to the Indian tribe treaty rights not inconsistent with the terms of the settlement statute. For example, the Act of June 1, 1910, 36 Stat. 455, 459 (Fort Berthold) provides:

> . . . nothing in this Act shall be construed to deprive said Indians of Fort Berthold Indian Reservation of any benefits to which they are entitled under existing treaties or agreement not inconsistent with the provisions of this Act.

Accord: Act of May 29, 1908, 35 Stat. 460, 464 (Cheyenne River). The Eighth Circuit Court of Appeals, in *City of New Town* v. *United States*, 454 F.2d 121, 125 (8th Cir. 1972), has interpreted this provision as confirming that the original boundaries of the Ft.

there is nothing on the face of a *trust-settlement* statute which supports, or even remotely indicates, a Congressional intent to disestablish the opened area from the Indian reservation.

Perhaps more importantly, each *trust-settlement* statute is distinguished by the following language or a close variation thereof:

> "That nothing in this Act contained shall in any manner bind the United States to purchase any of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, *it being the intention of this Act that the United States shall act as trustee for said Indians* to dispose of said lands to and expend and pay over the proceeds received from the sale thereof only as received and as herein provided. . . ." [Emphasis supplied][4]

By including an express trust provision in the statute, the United States voluntarily assumes a special fiduciary responsibility with regard specifically to the disposition

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Berthold Indian Reservation were not altered by the 1910 settlement statute:

> The 1910 Act specifically recognized that the opening of the reservation for homesteading was not intended to deprive the Indians of any rights not inconsistent with the Act, and as *Seymour* establishes, homesteading is not inconsistent with the maintenance of the original reservation boundaries. The 1910 Act clearly by its own terms does not purport to alter the reservation boundaries.

See also Act of April 23, 1904, 33 Stat. 302, as amended, Act of May 29, 1908, 35 Stat. 444, 448-50, which reserve for the Flathead Indians "Winters doctrine" water rights in the settled reservation area. (*See Winters* v. *United States*, 207 U.S. 564 (1908)).

[4] 36 Stat. 455, 458-59 (Fort Berthold). *See also* 35 Stat. 460, 464 (Cheyenne River); 34 Stat. 80, 82 (Colville); 33 Stat. 302, 305-06 (Flathead).

of the Indians' surplus and unallotted reservation lands, over and above the fiduciary duty inherent in the federal government's traditional relationship to Indian tribes. That is to say, the United States agrees to dispose of the Indians' land in the best interests of its wards, and the Congressional intent or purpose behind any *trust-settlement* statute must be measured against this express assumption of stewardship. Your *amici* submit that whereas, in the late 1800's and early 1900's it was, in the opinion of some government officials, arguably in the best interest of certain Indian tribes to convert surplus and unallotted lands into a monetary equivalent (presumably for the purpose of exposing the Indians to the "civilizing" influence of white neighbors), it cannot be seriously contended that the government's outright disestablishment of Indian reservations and the consequent elimination of tribal jurisdiction over these reservation homelands could be considered in the best interests of the Indians.[5] To the contrary, we believe that such disestablishment, under ordinary circumstances, would constitute a gross abuse of trust. For this reason, your *amici* submit that in any instance where the terms of a settlement statute does not, on its face, indicate a Congressional intent to disestablish or deprive the Indian tribe of jurisdiction over its reservation lands, and where the United States expressly assumes a trustee's role for the disposition of surplus reservation land, it must be concluded, in the absence of express Congressional action to the contrary, that such disestablishment was never effected.

In *Seymour* v. *Superintendent*, *supra*, this Court considered the effect of a *trust-settlement* statute, the Act of March 22, 1906, 34 Stat. 80, on the southern half of

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[5] It should be noted that in most instances, the Indian reservation subject to settlement encompassed the aboriginal homelands of the resident Indian tribes.

the diminished Colville Indian Reservation. In a landmark decision, this Court held that tribal jurisdiction over the reservation continued, notwithstanding that the land had been opened to white settlement. Confronted with the interpretation of similar *trust-settlement* statutes, the Circuit Courts of Appeals, *United States ex rel. Feather* v. *Erickson*, 489 F.2d 99 (8th Cir. 1973);[6] *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (8th Cir. 1973); *City of New Town* v. *United States*, 454 F.2d 121 (8th Cir. 1972), and federal district courts, *Confederated Salish and Kootenai Tribes* v. *Namen*, No. 2343 (D. Mont. August 14, 1974), have followed suit.[7]

2. In an *express cession-in-trust* statute, the Indians agree to "cede, grant and relinquish" defined portions of their Indian reservation to the United States, in consideration of which the United States agrees to dispose of the ceded land under the homestead and townsite laws of the United States, and to program the proceeds of settlement exclusively to the benefit of the Indians.[8] In addition, the United States expressly assumes a trustee's role to oversee the proper disposition of the Indian's property.[9] With regard to an *express cession-in-trust* statute, your *amici* submit that in each case where the settlement statute is not entirely clear on its face, but where the United States assumes the special duty of a trustee to dispose of the Indians' surplus lands in their

[6] The issue in the instant case was joined by the conflicting holding of the Supreme Court of the State of South Dakota in *DeCoteau* v. *District County Court*, —— S.D. ——, 211 N.W.2d 843 (1973).

[7] *But see Rosebud Sioux Tribe* v. *Kneip*, 375 F.Supp. 1065 (D. S.Dak. 1974).

[8] Wind River Indian Reservation, Wyoming: Act of March 3, 1905, 33 Stat. 1016; Crow Indian Reservation, Montana: Act of April 27, 1904, 33 Stat. 352.

[9] 33 Stat. 1016, 1020-21 (Wind River); 33 Stat. 352, 361-62 (Crow).

best interests, a presumption is raised that Congress did not intend to disestablish the reservation, and such presumption can only be rebutted by a clear and unequivocal showing of contrary Congressional action. In *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 166 (1920), this Court relied primarily upon the trusteeship provision in the Act of April 27, 1904, 33 Stat. 352 in holding that said *express cession-in-trust* statute did not automatically convert the ceded portion of the Crow Reservation into "[p]ublic lands".

3. In *Mattz* v. *Arnett*, *supra*, this Court specifically considered a third class of settlement statute which declares certain Indian lands open to settlement under the homestead laws of the United States, without the use of cession, sale or relinquishment terminology. Further, the statute provides for Indian allotments, and for the application of settlement proceeds to the credit of resident Indians.[10] However, these *surplus land* statutes are distinguished from *trust-settlement* or *express cession-in-trust* statutes by the lack of a trusteeship provision. Nevertheless, this Court held in *Mattz* that the Act of June 17, 1892, 27 Stat. 52, a *surplus land* statute, did not disestablish the Klamath River Reservation, notwithstanding a substantial body of evidence which tended to show a prior Congressional intent to disestablish the reservation, and an apparent partial abandonment of the reservation by the former resident Indians. The inescapable conclusion is that the evidence supporting disestablishment, although substantial, was not clear and convincing and, hence, did not rebut the presumption against disestablishment. And again, the Circuit Courts of Appeals have followed suit. See the recent case of *United States* v. *Washington*, 496 F.2d 620 (9th Cir. 1974), wherein the Ninth Circuit upheld the continuing

[10] Klamath River Indian Reservation, California: Act of June 17, 1892, 27 Stat. 52.

existence of the Puyallup Indian Reservation,[11] basing said holding squarely on *Mattz* v. *Arnett*, *supra*.

4. We come to a fourth type of settlement statute, *i.e.*, *cession* statute, which is characterized by elements of sale, and by elements of trust, although the United States expressly assumes no trusteeship. These statutes are invariably accompanied by a confusing and contradictory legislative history which, no doubt, can be attributed in large part to the ambiguous nature of the language itself. With regard to cession statutes, your *amici* submit that no presumption arises in favor either of disestablishment or continuing reservation status. Rather, the reviewing court must carefully consider the provisions of the statute in the clarifying light of its legislative history and surrounding circumstances and discern therefrom the Congressional intent. As defined herein the Act of March 3, 1891, 26 Stat. 989, 1035, which opened the Lake Traverse Reservation to settlement, is an example of a *cession* statute.[12]

5. Congress has enacted a fifth type of settlement statute, *i.e.*, *termination statute*, which clearly effects a disestablishment of the settled reservation area through an absolute or unqualified sale or cession of land to the United States for stated consideration.[13] To be sure,

[11] The Puyallup Indian Reservation was opened by the Act of March 3, 1893, 27 Stat. 612, 633, a *surplus land* statute directly comparable to the settlement statute considered by this Court in *Mattz*.

[12] *See* discussion *infra* at 14-21 for an analysis of the significant circumstances surrounding the Lake Traverse statute which confirm, in our opinion, that this particular cession statute did not effect a termination or disestablishment of the reservation.

[13] Navajo Indian Reservation, New Mexico: Act of May 29, 1908, 35 Stat. 444, 457; Ponca, Otoe and Missouria Indian Reservations: Act of April 21, 1904, 33 Stat. 189, 217; Colville Indian Reservation, Washington, Act of July 1, 1892, 27 Stat. 62; Smith River

these statutes on their face expressly utilize the terminology of disestablishment.[14] Of course, the United States does not assume the role of trustee in such transactions, for such status would, in the opinion of your *amici*, be in direct conflict with the disestablishing effect of the statute. Thus, a *termination* statute raises a clear presumption that the area in question has been made a part of the public domain, free of tribal jurisdiction, and said presumption endures unless and until clear and convincing evidence is presented to the contrary. In such instances, the courts have had no difficulty in holding a disestablishment of the settled area. *Seymour* v. *Superintendent*, 368 U.S. 351, 354 (1962).

Reservation, California: Act of July 27, 1868, 15 Stat. 198, 221. *See also* the Klamath Termination Act, 25 U.S.C. §§ 564-564x, and the Menominee Termination Act, 25 U.S.C. §§ 891-902, the terms of which show quite clearly that Congress leaves no doubt on the face of a statute when termination of federal trust responsibility is intended.

[14] The surplus lands of the Navajo Indian Reservation, New Mexico, were "restored to the public domain and opened to settlement and entry by proclamation of the President." 35 Stat. 444, 457. The reservation lines of the Ponca, Otoe and Missouria Indian Reserations were "abolished." 33 Stat. 217, 218. The northern half of the Colville Indian Reservation was "vacated and restored to the public domain." 27 Stat. 62, 63. The Smith River Reservation was "discontinued". 15 Stat. 198, 221. The requirement of precise and unequivocal language for causing a termination of Indian rights is further evidenced by the holdings of this and other courts that certain treaty rights, such as hunting and fishing rights, survived even the clear and undisputed terminating effect of the Menominee and Klamath Termination Acts. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Kimball* v. *Callahan*, 493 F.2d 564 (9th Cir. 1974).

III. ANALYSIS OF THE SETTLEMENT STATUTE WHICH OPENED THE LAKE TRAVERSE INDIAN RESERVATION TO NON-INDIAN SETTLEMENT (ACT OF MARCH 3, 1891, 26 STAT. 989, 1035).

As stated previously, it is our opinion that the Act of March 3, 1891, 26 Stat. 989, 1035, although a *cession* statute, did not disestablish the Lake Traverse Reservation; rather, that the land opened for settlement was intended by Congress to be part of a continuing reservation for the Sisseton and Wahpeton Indians and subject to their uninterrupted tribal jurisdiction. Our opinion is based upon an analysis of the terms of the statute in light of the following circumstances:

1. We believe that whatever the original purpose of the 1889 agreement, the terms of the 1891 Act transformed the agreement into an *implied cession-in-trust*,[15] thereby confirming a Congressional intent not to disestablish the Lake Traverse Reservation. Section 30 of that Act provides that the lands of Lake Traverse are to be sold only under the homestead and townsite laws of the United States for $2.50 per acre,[16] precisely the amount previously advanced to the Indians by the Government for these lands. It is therefore not unreasonable to conclude that the United States, rather than being regarded as vendee of the Lake Traverse Reservation, should be regarded as guarantor of the interests of the Sisseton and Wahpeton Indians. For, in effect, the United States simply prepaid the Indians for their surplus land, and recouped its expenses from the white settlers. Indeed, there are compelling reasons why the United

[15] We believe that it is reasonable to reclassify each *cession* statute into (1) an *implied cession-in-trust* statute or (2) an *implied termination statute*, depending upon a judicial finding in each case of Congressional intent as discerned from the statute's legislative history and surrounding circumstances.

[16] 26 Stat. 989, 1039.

States, in this particular case, would agree to assume a guarantor's role for the Sisseton and Wahpeton Indians. First, the Indians were in an improverished and deteriorating state at the time these negotiations were ongoing.[17] Second, the Sisseton and Wahpeton Indians had been loyal scouts in the service of the United States, but had not been paid or otherwise compensated for their faithful service to their country.[18] Therefore, it is not unreasonable to assume that our government would, in consideration of the Indians' demonstrated friendship and loyalty to the United States, assume an added responsibility toward these Indians in order to guarantee them a reasonable return for the homestead settlement of their lands.

2. It is significant that the 1891 Act opened for settlement all of the unallotted land on the Lake Traverse Reservation. Thus, this is not a situation in which the Indians would, in the face of an adverse court decision, be left at the very least with a diminished but adequate reservation. In fact, if this Court holds that the 1891 Act had the disestablishing effect attributed to it by the

[17] *See* Letter of A.C. Mellette, Governor of South Dakota, to John W. Noble, Secretary of the Interior (December 13, 1890), National Archives Records of the Bureau of Indian Affairs, Letters Received: Special Case 147, Letter No. 39462 (reproduced in Brief for the Petitioner at App. 54, *DeCoteau* v. *District County Court*, No. 73-1148).

[18] The government's special debt to these Indians was acknowledged specifically in Section 27 of the 1891 Act (26 Stat. at 1038), wherein money was appropriated for compensating

> . . . the scouts and soldiers of the Sisseton, Wahpeton, Medawakanton, and Wapakoota bands of Sioux Indians, who were enrolled and entered into the military service of the United States and served in suppressing what is known as the "Sioux outbreak of eighteen hundred and sixty-two;" or those who were enrolled and served in the armies of the United States in the war of the rebellion, and to the members of their families and descendants, now living, of such scouts and soldiers as are dead. . . .

State of South Dakota, there would no longer be, for all intents and purposes, a Lake Traverse Indian Reservation.[19]

In the opinion of your *amici*, it is simply inconceivable that the United States, as guardian and trustee of the Sisseton and Wahpeton Indians, intended to repay their loyal and faithful service by depriving them of their reservation. For this reason, any doubt as to the intent or effect of the 1889 agreement or 1891 Act, no matter how slight, should be resolved in favor of the Indians. *Worcester* v. *Georgia*, 31 U.S. 515 (1832).

3. Both the 1889 Agreement and the 1891 Act cite as specific authority therefor the General Allotment Act, Act of February 8, 1887, 24 Stat. 388.[20] This Court has previously stated, in *Mattz* v. *Arnett*, *supra*, that the "policy" of the General Allotment Act was "to continue the reservation system and the trust status of Indian lands. . . ." *Mattz* v. *Arnett*, 412 U.S. at 496. *Cf. United States* v. *Nice*, 241 U.S. 591 (1916). Inasmuch as the terms of the 1891 Act do not disestablish, abolish or make a part of the public domain the lands of the Lake Traverse Reservation, there is every reason to believe that Congress intended the reservation system to continue on the Lake Traverse Reservation, after the unallotted land had been opened to white settlement.

4. The United States correctly points out that the State of South Dakota's proposed construction of the

[19] A similar situation prevailed in *Mattz* where the act of June 17, 1892, 27 Stat. 52, opened for settlement all of the unallotted lands embraced within the Klamath River Reservation, and where this Court held, despite evidence in the record that very few Indians remained resident upon the reservation, that the settled lands had not been disestablished.

[20] 26 Stat. 1036, 1039. The 1889 agreement provides:

> Now, therefore, this agreement made and entered into in pursuance of the provisions of the Act of Congress approved February eight, eighteen hundred and eighty-seven. . . .

1889 agreement and 1891 Act would result in a "crazy-quilt pattern" of federal, state, and tribal jurisdiction, and would thus greviously encumber the right of the Sisseton and Wahpeton Indians to self-government.[21] This Court has previously held that in the absence of express Congressional action to the contrary, the reach of state jurisdiction over Indian tribes will be checked when it begins to infringe upon the right of reservation Indians "to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). Where, as here, there is no express Congressional action disestablishing the reservation or extending state jurisdiction over the affairs of reservation Indians, the jurisdiction of the tribe over its entire reservation should remain unimpaired.

5. There has been a continuous federal presence on the Lake Traverse Reservation and an uninterrupted recognition by the federal government of trust responsibility, ranging from the maintenance of federal services, to the extension of allotments on the reservation, and through recent proposals to restore ceded reservation land to tribal ownership.[22] We know that the federal government's plenary authority over Indian affairs precludes the imposition of state jurisdiction, except in those instances where Congress has expressly provided that state law shall apply, or where state jurisdiction does not interfere with federal policies concerning Indian reservations. *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962); *Williams* v. *Lee*,

[21] Memorandum for the United States as Amicus Curiae at 3-10, *DeCoteau* v. *District County Court*, No. 73-1148.

[22] Specific documentation of the federal governments continuous recognition of reservation status for the Lake Traverse Reservation is presented in great detail in Brief for the Petitioner at 33-46, *DeCoteau* v. *District County Court*, No. 73-1148.

358 U.S. 217 (1959). This Court has recently acknowledged the importance of federal presence and subsequent recognition of reservation status in determining the effect of settlement statutes. *Mattz* v. *Arnett*, 412 U.S. at 505. In light of the continuing federal recognition of reservation status, and in the absence of express Congressional action to the contrary, we believe that the Act of March 3, 1891, 26 Stat. 989, 1035, should not be construed as disestablishing the Lake Traverse Reservation.

6. It is important to note, as well, that whereas the Act of March 3, 1891, 26 Stat. 989 et. seq., opened for settlement the lands of seven different Indian tribes,[23] the specific terms of the 1891 Act applicable only to the Lake Traverse Reservation are distinct in at least four different respects from the provisions of the other six agreements, distinctions which your *amici* believe confirm a Congressional intent not to disturb the continuing reservation status of the Lake Traverse Reservation.

a. The preamble of the Sisseton-Wahpeton Agreement, quoting section 5 of the Dawes Act, 24 Stat. 388, 389 provides in pertinent part:

> Whereas, by section 5 of the Act of Congress entitled . . . it is provided '. . . *if in the opinion of the President it shall be for the best interests of said tribe*, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by the said tribe, *in conformity with the treaty or statute under which such reservation is held*, of such portions of its reservations not allotted as such tribes shall from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians. . . .' [Emphasis supplied]

[23] In addition to the land of the Sisseton and Wahpeton Indians, the Act of March 3, 1891, 26 Stat. 989 opened the lands of the following Indian tribes to white settlement: (1) Citizen Band of Pottawatomie Indians (26 Stat. at 1016); (2) Absentee Shawnee Indians (26 Stat. at 1018); (3) Cheyenne and Arapahoe Indians (26 Stat. at 1022); (4) Coeur d'Alene Indians (26 Stat. at 1026); (5) Arickaree, Gros Ventre and Mandan Indians (26 Stat. at 1032); and (6) Crow Indians (26 Stat. at 1039).

Your *amici* believe that the language quoted above, which conditions the conveyance of Indian land upon the initiative and consent of the Indians, and which directs the President to act in "the best interests of said tribe", is equivalent, in many respects, to the important trusteeship provision contained in *trust-settlement* statutes and *express cession-in-trust* statutes, and emphasizes the trust obligations of the United States under this *cession* agreement sufficiently so as to transform it into an *implied cession-in-trust*.

b. Although, by the terms of the 1889 agreement and 1891 Act, the Sisseton and Wahpeton Indians agreed to cede, sell, relinquish, and convey to the United States the unallotted lands on their reservation, the distinct and unequivocal language of termination, present in most of the other agreements ratified by the Act of March 3, 1891, is not present.[24]

c. The Lake Traverse compact is the only one of the seven *cession* statutes contained in the Act of March 3, 1891 which does not provide for a proposed or actual survey of the ceded portion of the reservation or the

[24] For example, the Citizen Band of Pottawatomie Indians agreed to "cede, relinquish, and *forever and absolutely surrender to the United States all their claim, title and interest of every kind and character*. . . ." (26 Stat. at 1016), as did the Absentee Shawnee (26 Stat. at 1019). The Cheyenne and Arapahoe Indians agreed to "cede, convey, transfer, relinquish, and *surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest, of every kind and character*. . . ." (26 Stat. at 1022). The Coeur d'Alene Indians agreed to "cede, grant, relinquish, and *quitclaim* to the United States all right, title and claim which they now have, or ever had. . . ." (26 Stat. at 1027, 1030). [Emphasis supplied].

unceded remainder of the reservation,[25] or for an express reservation of certain defined lands as a permanent home for the Indians.[26]

d. The Lake Traverse settlement statute is the only one which provides for a per acre consideration for the Indians. The remaining six settlement agreements provide for payments of lump sum consideration to the Indians for the ceded portion of their reservation.[27] As stated previously, this fact, taken together with all other circumstances touched upon in this brief, suggest quite strongly that the government intended to act as guarantor for the Sisseton and Wahpeton Indians, rather than as vendee of the Lake Traverse Reservation.

7. The agreement of 1889 and the confirmatory Act of March 3, 1891 are, in essence, contracts executed between the Sisseton and Wahpeton Indians and the federal government. It is significant therefore that, in this case, both contracting parties are in total agreement as to the intent and subsequent effect of these contracts.[28]

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[25] *See, e.g.*, 26 Stat. at 1016 (Citizen Band of Pottawotamie); 26 Stat. at 1019 (Absentee Shawnee).

[26] *See, e.g.*, 26 Stat. at 1027 (Coeur d'Alene); 26 Stat. at 1035 (Arickaree, Gros Ventre, Mandan).

[27] *Compare* 26 Stat. at 1036 (Sisseton-Wahpeton) *with* 26 Stat. at 1018 (Citizen Band of Pottawatomie); 26 Stat. at 1020 (Absentee Shawnee); 26 Stat. at 1024 (Cheyenne and Arapahoe); 26 Stat. at 1028, 1030 (Coeur d'Alene); 26 Stat. at 1033 (Arickaree, Gros Ventre, Mandan), 26 Stat. at 1040 (Crow).

[28] The opinion and supporting analysis of the United States has been expressed in the sister case of *DeCoteau* v. *District County Court*, No. 73-1148 (Memorandum for the United States as Amicus Curiae). The government concluded therein that the 1891 Act did not change the reservation boundaries of the Lake Traverse Indian Reservation, a conclusion fully in accord with the contentions of respondent Indians in the instant case and the petitioner Indians in *DeCoteau*. Brief for the Petitioner, *DeCoteau* v. *District County Court*, No. 73-1148.

Such a meeting of the minds, although not always conclusive, should be given great weight. *Cf. Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F.Supp. 1001, 1004 (D. Minn. 1971).

CONCLUSION

Your *amici* submit that when the Act of March 3, 1891, 26 Stat. 989, 1035, is viewed against the "backdrop" of Indian tribal sovereignty, *McClanahan* v. *State Tax Comm'n*, *supra*, and the circumstances set forth above, it is clear that said Act did not disestablish the Lake Traverse Indian Reservation, or, in the alternative, that inasmuch as the Act of March 3, 1891 is ambiguous on its face and its legisltaive history and surrounding circumstances can be cited as support for either disestablishment or continuing reservation status, the doubts as to the continuing validity of the Lake Traverse Reservation must be resolved in favor of the Sisseton and Wahpeton Indians. *Worcester* v. *Georgia*, *supra*.

For the foregoing reasons, the decision of the Eighth Circuit in the instant case, *Erickson* v. *Feather*, No. 73-1500, should be affirmed and, consequently, the decision of the South Dakota Supreme Court in *DeCoteau* v. *District County Court*, No. 73-1148, should be reversed.

Respectfully submitted,

GLEN A. WILKINSON
Counsel for Arapahoe Tribe, Wyoming

JERRY C. STRAUS
Counsel for Three Affiliated Tribes, North Dakota

RICHARD A. BAENEN
Counsel for Confederated Salish and Kootenai Tribes, Montana

WILKINSON, CRAGUN & BARKER
ALAN I. RUBINSTEIN
Of Counsel

August, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary,

Petitioner,

v.

United States of America ex rel. JOHN LEE FEATHER,
United States of America ex rel. LAVERNE BLACK THUNDER,
United States of America ex rel. AMBROSE ST. JOHN,
United States of America ex rel. JAMES R. KEEBLE,
United States of America ex rel. CURTIS SMALL,
United States of America ex rel. ROMAN V. DERBY,
United States of America ex rel. JOSEPH DAY,
United States of America ex rel. ARNOLD LAFROMBOISE,
United States of America ex rel. CLARENCE WALKER,
United States of America ex rel. THEODORE DUANE WYNDE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

KERMIT A. SANDE
Attorney General
State of South Dakota
State Capitol Building
Pierre, South Dakota 57501

WALTER W. ANDRE
Assistant Attorney General
State Capitol Building
Pierre, South Dakota 57501

TOM D. TOBIN
Special Assistant Attorney General
422 Main Street
Winner, South Dakota 57580

Attorneys for Petitioner

O'CONNOR PRINTERS — SIOUX FALLS, S. DAK.

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REPLY BRIEF FOR PETITIONER

INTRODUCTORY STATEMENT

A total of ten separate Briefs have been submitted in *DeCoteau v. District County Court*, No. 73-1148, and *Erickson v. Feather, et al.*, No. 73-1500, which are essentially directed to the effect of the Act of March 3, 1891, on the size, area or boundaries of the original Lake Traverse Reservation. The attempt to confine the arguments and replies in each Brief to only those arguments presented in each case has necessarily been difficult. The most recent example of this difficulty is the Brief for the United States as *Amicus Curiae* (hereinafter cited as B.U.S.) which was submitted in response to the Court's order of April 29, 1974, inviting the Solicitor General to express the views of the United States in *DeCoteau v. District County Court*. While the invitation to this Court did not extend to the case of *Erickson v. Feather*, the Brief submitted by the United States includes, by caption, *Erickson v. Feather*, and is stated to also express the views of the United States in this "closely related case." B.U.S. at 2. Therefore, the State will rely on the Brief for Respondent in *DeCoteau v. District County Court* (hereinafter cited as B.R., *DeCoteau)* which effectively disposes of those arguments of substance submitted prior to that date on behalf of the position of the Sisseton-Wahpeton Tribe, which need not be repeated here, and confine this Reply Brief to clarifying the position of the State of South Dakota and responding to the arguments which have been presented since that time.

ARGUMENT

I

A RECOGNITION OF THE POSITION OF THE STATE OF SOUTH DAKOTA DOES NOT REQUIRE THIS COURT TO OVERRULE *SEYMOUR V. SUPERINTENDENT*, 368 U.S. 351 (1962), OR *MATTZ V. ARNETT*, 412 U.S. 481 (1973).

In the opening sentence of the Reply Brief for Petitioner in *DeCoteau* (hereinafter cited as R.B.P., *DeCoteau)* it is stated

that the State of South Dakota "asks this Court to overrule *Seymour v. Superintendent*, 368 U.S. 351 (1962), and *Mattz v. Arnett*, 412 U.S. 481 (1973)." R.B.P. at 1, *DeCoteau*. This is *not* the position of the State of South Dakota before this Court and the following should serve to reemphasize that point.[1]

All Briefs submitted to date seem to be in agreement with the one fundamental rule that permeates this area of Federal Indian Law: Separate treaties or agreements with separate tribes must be separately construed. In the words of Petitioner in *DeCoteau*, "each agreement with a tribe must be taken on its own facts and legislative history." R.B.P., N. 13 at 8, *DeCoteau*. The standards set forth by this Court in *Mattz*, that disestablishment need only be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history, and the statement in *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (CA 8 1973), cited by this Court with approval in *Mattz*, that "each case, of course, must be decided under the applicable statute and upon its own facts," are only variations of this same basic precept. *Condon, supra* at 689.

The State of South Dakota in the Brief for Respondent, *DeCoteau*, has set forth those sections of the 1891 Act, and the legislative history and surrounding circumstances, that clearly establish that the unallotted land of the Lake Traverse Reservation was restored to the public domain, and the reservation, as originally described, thereby disestablished. In the absence of some provision on the face of the Act or circumstances set forth in the legislative history, which the State has never seen, and no Brief has been able to produce, that is contrary to the probative evidence of disestablishment presented to date, this material should be dispositive of the issue — and there is nothing in the holding of either *Seymour* or *Mattz* to dictate against this result.

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1. The Reply Brief for Petitioner in *DeCoteau v. District County Court*, was not completed in time for the State of South Dakota to receive a printed copy. As a result, the citations herein are to the final draft of the typewritten manuscript which was forwarded by counsel for Petitioner to the State of South Dakota.

However, to the extent that the specific holdings in *Seymour* and *Mattz*, in combination with certain dicta concerning the General Allotment Act as it related to settlement statutes in *general*, might have seemed to preclude this result in *general*, the State of South Dakota undertook what is admittedly a rather exhaustive compilation of documentation in support of its position, not only in *general*, but also as it specifically referred to the Lake Traverse Reservation. In light of the fact that Petitioner in *DeCoteau* now concedes that:

> In the period following the General Allotment Act, Act of February 8, 1887; c. 119, 24 Stat. 388, Federal Indian policy was directed toward the severance of tribal relations and the reduction of reservations
>
> . . . .

the legitimacy of this reconstruction, in terms of the *tenor* of the times is not in question. R.B.P. at 1, *DeCoteau*. Nor is the fact that the mere practice of allotment pursuant to the 1887 General Allotment Act, could *not* have accomplished this result even in issue. The extension of the trust period and subsequent definition of Indian Country in 1948 (18 U.S.C. 1151), effectively precluded disestablishment by this process alone, and the State of South Dakota has *never* questioned that in this respect most reservations are basically intact, insofar as the boundaries are concerned. Nevertheless, a special Act of Congress, passed pursuant to a separate provision of the General Allotment Act, which *was* intended to restore the lands so ceded to the public domain and effectively disestablish whatever exterior boundaries that were encompassing that land, *did* disestablish the reservation or portions thereof so affected.[2] The only question that remains is whether the 1891 Sisseton-Wahpeton Act can fairly be said to fit into this historical context. R.B.P. at 1, *DeCoteau*. If it can, the lands held in trust by the Federal Government for

2. Any position to the contrary would necessarily result in reservation boundaries within reservation boundaries within reservation boundaries, *ad infinitum*.

the Sisseton-Wahpeton Tribe today, would unquestionably be Indian Country (18 U.S.C. 1151 (c)) and as such, would still constitute a reservation—but the boundaries of the Lake Traverse Reservation as *originally* established in 1867 would no longer pertain. In essence, this has been the position of both the state and federal courts for over fifty years, insofar as this specific area is concerned. B.R. at 153-165, *DeCoteau*.

The State of South Dakota has presented this Court with probative evidence in unequivocal support of this same position. The fact that the Acts presented for construction in *Seymour* and *Mattz* did not, on their face or in their legislative history and surrounding circumstances, contain evidence of similar import, does not detract from the language of the Sisseton-Wahpeton Act nor the surrounding circumstances and legislative history thereof. The decision in the instant case does not have to conform to the specific *holdings* in *Seymour* and *Mattz*, which were presumably the result of the absence of this same probative evidence. It is in recognition of, and under this construction of the 1891 Act, that the Sisseton-Wahpeton Tribe has existed and prospered for the last eighty years.

For this Court to recognize that the 1867 exterior boundaries of the original Lake Traverse Reservation no longer exist would not, in any way, result in a "destruction" of the Tribe. The Federal Government would continue to assist the economic development of the Tribe, as it has in the past, and the State would urge it to do so. The Tribal Organization could continue to regulate the business and lives of the members of the same, insofar as such regulations related to areas of the original reservation that remain in trust. Such a holding would not affect these fundamental aspects of Tribal Government. It would, however, deter action similar to that of September 4, 1974, when, by the vote of six individuals, it was unilaterally declared that since the decision below recognizes that the boundaries of the original Lake Traverse Reservation still pertain, that this same Tribal Government has "*complete criminal and civil jurisdiction over all non-*

Indians" residing therein. Exec. Resolution No. 75-25 of Sept. 4, 1974, Sisseton-Wahpeton Sioux Tribe. Similarly, it would also prevent the requirement that these same non-members be "licensed," for the first time, as recently demanded by the Tribe, in order to continue to conduct their business in an area that has not been encompassed by the original boundaries of the Lake Traverse Reservation since 1892.

II

THE MAJOR ARGUMENTS ADVANCED IN FAVOR OF THE RECOGNITION OF THE ORIGINAL 1867 BOUNDARIES OF THE LAKE TRAVERSE RESERVATION DO NOT REFLECT THE LANGUAGE OF THE 1891 ACT OR THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES THEREOF.

It has been the position of the State of South Dakota since this Court granted Certiorari on June 3, 1974, that it would welcome the contributions of any and all responsible parties

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3. Petitions with over 15,000 signatures have been forwarded to the South Dakota Congressional Delegation protesting this action. Unfortunately, what the State termed a *remote* possibility less than three months ago in the *Brief for Respondent, DeCoteau*, has become very much a reality:

> Due Process under the 1968 Indian Civil Rights Act does not require court appointed counsel to defend the rights of indigents. No qualifications whatsoever are minimal to quality as "counsel" or "judge." While the right to a trial by jury is required by the terms of the Act, in practice even this basic right is ephemeral. When one also considers that in civil actions, the tribal courts will be the only courts wherein non-members can bring a cause of action against the members of any tribe, the qualifications of the tribal judiciary and limitations on the right to practice therein assumes a degree of additional significance. Even more so, the *remote possibility* of the assertion of criminal jurisdiction by the tribe over *non-member residents* who have no representation whatsoever in the Tribal Government raises enough constitutional and other issues to "boggle one's mind." B.R., N. 29 at 199, *DeCoteau* (emphasis added).

In addition to the Sisseton-Wahpeton Tribe, two other Tribes in South Dakota have enacted similar statutes and others are in the process of doing the same. When one considers that less than two years ago, the majority of these "non-members" never even dreamed they were "within" a reservation, the whole process approaches disbelief.

as *Amicus Curiae* and would itself submit any supplemental brief that this Court desired. B.P. at 74, 84, *Erickson*. B.R. at 71-72, 175, *DeCoteau*. A stipulation to this effect was filed in the Office of the Clerk. This position was assumed in recognition of the inherent difficulties presented by the necessity of having to reconstruct and interpret the language, legislative history, and surrounding circumstances of an Act of Congress passed over eighty years ago. The State has compiled and presented in its Briefs the legislative history and surrounding circumstances of the 1891 Act, and has discussed those provisions of the language of the Act and peripheral materials it deemed to be significant in a resolution of the issue. Included therein was the operative cession language of the Act, the "subject of the laws of the state" provision, the school land grant, the cartographic record, and numerous references in the *Congressional Record* and the Annual Reports of the Secretary of the Interior and Commissioner of Indian Affairs that specifically stated that the 1891 Act *would* and *did* restore 660,000 acres of land from the Lake Traverse Reservation to the public domain. In cooperation with the State of North Dakota, copies of these Briefs and Appendices were sent to the other states most directly affected, in order to determine whether they concurred in the analysis and arguments presented therein. Ten states replied that in their view, on the merits, the position of the State of South Dakota was soundly founded upon the language of the Act and the legislative history and surrounding circumstances. The Brief for the State of North Dakota, et al., as *Amici Curiae*, was thereafter submitted in response to this concurrence.

On the other hand, the Native American Rights Fund, on behalf of the Sisseton-Wahpeton Sioux Tribe as *Amicus Curiae*, the Arapahoe Tribe, the Three Affiliated Tribes and the Confederated Salish and Kootenai Tribes as *Amici Curiae*, and the United States as *Amicus Curiae*, submitted Briefs urging this Court to recognize the existence of the original 1867 Lake Traverse Reservation boundaries in the manner set forth in the Brief for Petitioner in *DeCoteau* and the Brief for Respondent in *Erickson*. An analysis of the

arguments common to each of these Briefs should be prefaced with what the State of South Dakota deems the most significant and salient characteristics of each: That is, a reluctance to squarely address or even recognize those areas of the Act and legislative history which are in irreconcilable conflict with the result this Court is urged to adopt, in addition to the rather conspicuous absence of citations to anything in the Act itself or the legislative history and surrounding circumstances thereof, that can fairly be said to support a position that Congress did not intend to effect the very result, which time and time again is documented in the material of the period.

A. The Holding of *Seymour* and *Mattz*. The State would submit that it is precisely because of the absence of any support of substance in the langauge of the Act or in the surrounding circumstances and legislative history thereof, that each and every brief submitted to date that urges a recognition of the original 1867 boundaries of the Lake Traverse Reservation does so in primary reliance on the hope that this Court will make a blanket application of the holding of *Seymour* or *Mattz*, without thoroughly examining the fact situation herein.[4] For example, "This Court should follow its *holdings* in *Seymour* and *Mattz*," R.B.P. at 13, *DeCoteau*.

In essence, the fact that this Court could not find probative evidence of an intent to restore to the public domain any portion of the Colville Reservation or the Klamath River Reservation in the situations presented in *Seymour* and *Mattz* is somehow supposed to be attributed to the language, legislative history, and surrounding circumstances of the 1891 Sisseton-Wahpeton Act. The very cases cited to support this position contain principles of construction which strongly dictate against such summary disposition of the nature thereby requested. The related pleas that any *result* other

4. A conservative estimate would be that approximately 95% of the arguments that have been advanced urging this Court to recognize the 1867 boundaries of the Lake Traverse Reservation are founded on materials and events subsequent to the date of the Act in question.

than that reached in *Seymour* and *Mattz* would necessarily mean overruling the same, have already been discussed and disposed of *supra*.[5]

B. The Public Domain. The extent to which the arguments in support of the existence of the original 1867 boundaries of the Lake Traverse Reservation are founded upon anything other than the 1891 Sisseton-Wahpeton Act and the legislative history and surrounding circumstances thereof, can most readily be demonstrated by the treatment accorded the concept of the public domain. The importance of this concept can hardly be questioned. It is almost axiomatic that any Act which restored land within the boundaries of any reservation to the public domain *necessarily* dissolved all exterior boundaries encompassing the same. In recognition of this fact, each and every Brief submitted in support of the original 1867 boundaries contains statements to the effect that the 1891 Sisseton-Wahpeton Act was *not* intended to restore the unallotted land within the 1867 boundaries of the reservation to the public domain. N.A.R.F. at 5, B.U.S. at 10, 14, 16, 17, R.B.P. at 5-6, *DeCoteau*, Brief for the Arapahoe Tribe, et al., at 16.

Although the Briefs submitted to date by the State of South Dakota contain no less than twelve direct references wherein Senator Dawes, the author of the General Allotment Act and the primary sponsor of the 1891 Act, various members of Congress, and the Annual Reports of the Secretary of the Interior and the Commissioner of Indian Affairs specifically and repeatedly stated that the 1891 Sisseton-Wahpeton Act *would* and *did* restore to the public domain approximately 660,000 acres from the Lake Traverse Reservation, not one paragraph in any of these Briefs contains so much as an indirect reference to this fact. B.R. at 7, 8, 45-46, 49, 55, 62, 63, 92, 97-98, *DeCoteau*, B.P. at 5, 46-47, 50, 56, 64, 68, *Erickson*. It is almost as if mere silence before this Court could obliterate the debates in the *Congressional Record* and the

5. Also, *See* B.R. at 179–184, *DeCoteau*.

effect specifically attributed to the 1891 Sisseton-Wahpeton Act in the Annual Reports of the Secretary of the Interior and Commissioner of Indian Affairs.

In addition, when one also considers the treatment accorded the school land grant, which was repeatedly stated to be subject to this same condition precedent in the enabling act, namely, that the "reservation shall have been extinguished and such lands be restored to, and become a part of the public domain," the silence on the specific references that the Sisseton-Wahpeton Act *would* and *did* restore the land thereby affected to the public domain becomes even more of an anomoly. Act of February 22, 1889, 25 Stat. 676. The substitute constructions presented by the United States and Petitioner in *DeCoteau*, as "plausible" alternatives to the condition precedent of the school land grant, do not detract from the absence of any discussion on this particular point.

C. The Operative Cession Language. The third area that receives essentially the same treatment in all of the Briefs submitted to date that urge this Court to recognize the original 1867 boundaries of the Lake Traverse Reservation is the operative cession language of the 1891 Sisseton-Wahpeton Act. The State of South Dakota has already pointed out the historical connotations, as well as the contemporary effect this language had on the boundaries of other reservations or portions thereof, in agreements ratified in the same bill as the Sisseton-Wahpeton Act. B.R., *DeCoteau*. The State of North Dakota, joined by ten other states, as *Amici Curiae*, substantiates this position and in addition has cited even more evidence in support thereof. Similarly, the fact that the United States inadvertently cited three cession statutes which undeniably disestablished portions of reservations, and with them their original exterior boundaries, as examples of similar "statutes ceding unalloted land" which purportedly could be "contrasted with statutes terminating reservations, or changing or diminishing their boundaries," has also previously been alluded to. Memorandum of the United States as *Amicus Curiae*, at 6. *See*, B.R. at 165-166, *DeCoteau*.

In the face of the total lack of other cession agreements on "all fours" with the language and method of payment utilized by Congress in the Sisseton-Wahpeton Agreement which could be cited as *not* disestablishing reservation boundaries or a portion thereof, the Briefs in support of a recognition of the original 1867 boundaries of the Lake Traverse Reservation have adopted another argument, though it too remains as untenable as the three previous examples cited by the United States for very much the same reason: The citation of earlier cases in which this Court ostensibly held that similar *cession* language did not affect the exterior boundaries of other reservations. An analysis of this argument reveals three distinct and very significant points. (1) The positions of the Briefs in this respect are not consistent, even in relation to each other. (2) In the decisions cited the issue now before this Court was not even presented. (3) The inference that the cession language did not disestablish the portion of the reservation thereby effected cannot be supported. The 1920 decision of *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), cited in the Brief for the Arapahoe Tribe, the Three Affiliated Tribes, and The Confederated Salish and Kootenai Tribes, as *Amici Curiae*, Brief for the United States as *Amicus Curiae*, and the Reply Brief for Petitioner, *DeCoteau*, demonstrates the irreconcilable inconsistencies inherent in this particular agrument.

With respect to the inconsistencies, the Brief for the Arapahoe Tribe, et al., as *Amici Curiae*, is founded upon the "significant distinctions" of various "settlement statutes" which center around the cession terminology, method of payment and the related degrees of fiduciary duties the *Amici* argue that the United States Government was therefore bound to abide by. The Brief clearly categorizes the 1904 Crow Act which was before the Court in *Ash Sheep*, as not in the same category as the Sisseton-Wahpeton "cession" statute, but rather as an example of an "express cession-in-trust" statute to which different "presumptions" apply. Brief

for Arapahoe Tribe, et al., at 10-11, 12. The United States *ignores* this very "significant distinction" and the position of the Reply Brief for Petitioner in *DeCoteau*, in this regard is entirely ambiguous. B.U.S. at 17-19, R.B.P. at 6-8, *DeCoteau*.

With respect to the second point, an examination of the *Ash Sheep* opinion reveals that while the fact situation involved the violation of a Federal statute relating to Indian lands, the question before the Court was essentially whether the Crow Tribe was entitled to any beneficial interests that might result from the portion of the reservation ceded *until* the land had been disposed of per the terms of the 1904 Act. The Court held that the Tribe was so entitled and specifically noted that:

> . . . until sales should be made, any benefits which ought to be derived from the use of the lands would belong to the beneficiaries, and not to the trustee, and that they did not become 'public lands' in the sense of being subject to sale or other disposition, under the General Land Laws. Union P.R. Co. v. Harris, 215 U.S. 386, 388, 54 L. ed. 246, 247, 30 Sup. Ct. Rep. 138. They were subject to sale by the government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904 . . . . *Ash Sheep, supra* at 166.

The issue before this Court was not even before the Court in *Ash Sheep* opinion reveals that while the fact situation in*trust* arrangement for the disposal of the ceded land and subsequent payment to the Crow Indians involved, similar to that in *Seymour*, and most definitely distinguishable from the sum-certain arrangement in the instant case, as was pointed out by the Brief for Arapahoe Tribe, et al.

With respect to the final and most significant point, the fact that the lands so ceded in *Ash Sheep* were not in all respects "public land" pending disposition was no indication that they remained within the exterior boundaries of the Crow Reservation and were not a part of the *public domain* with respect to the issue in the instant case. The Briefs advocating a recognition of the original 1867 Lake Traverse boundaries have cited *Ash Sheep* as persuasive authority from this Court for the proposition that since the cession language therein did not extinguish the exterior boundaries of the Crow Reservation surrounding the ceded portion of the Crow Reservation, the cession language of the Sisseton-Wahpeton Act could not have accomplished that result in the Sisseton-Wahpeton situation. This argument was most succinctly advanced in the Brief for the United States, *Amicus Curiae*:

> That a 'cession' of unalloted land within a reservation does not of itself disestablish the reservation is supported by this Court's decision in *Ash Sheep Co. v. United States*, 252 U.S. 159 . . . While, in our case, jurisdiction rather than ownership is at issue, *Ash Sheep Co.* at least indicates that the use of the word 'cede' does not always imply a termination of the Indian-federal relationship as to the land 'ceded.' B.U.S. at 17-19.

Rather than "support" the position of the advocates of the original 1867 Lake Traverse Reservation boundaries, the 1904 Crow Act and the *Ash Sheep* opinion undermine the crux of their entire Briefs in this respect.

In another portion of the *Ash Sheep* opinion, the Court noted that:

> The agreement embodied in this act of Congress provided for a division of the Crow Indian Reservation in Montana on boundary lines which were described, and the lands involved in this case were within the part of the Reservation as to which the Indians, in terms, 'ceded, granted, and relinquished' to the United States all of their 'right, title, and interest.' *Ash Sheep, supra*, at 163.

The text of the Crow Act describes the new boundaries in no less than five separate provisions:

> ARTICLE IV. That for the purpose of segregating the ceded lands from the diminished reservation the new boundary lines described in Article I of this

agreement shall, when necessary be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States. 33 Stat. 352, 355.

'ART. IV. That for the purpose of segregating the ceded lands from the diminished reservation the new boundary lines described in Article I of this agreement shall, when necessary, be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States. 33 Stat. 352, 359.

'ART VIII. The right to take out water upon the diminished reservation subject to any prior claim of the Indians thereto by reason of previous appropriation, and the right to construct, maintain, and operate dams, flumes, and canals upon and across the said diminished reservation for the purpose of irrigating lands within any portion of the ceded tract are hereby granted, such rights to be exercised by persons, companies, or corporations under such rules, regulations, and requirements as may be prescribed by the Secretary of the Interior. 33 Stat. 352, 359.

SEC. 3. That for the purpose of surveying and marking so much of the boundary line of the tract ceded and relinquished by the Indians as may be necessary to segregate the same from the lands reserved by them, as provided in article four of said agreement, the sum of one thousand two hundred dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, the sum of forty thousand dollars, or so much thereof as may be necessary, for the completion of the survey and subdivision of said ceded lands, the same to be reimbursed out of the first moneys to be received from the sale of said lands.

SEC. 4. That the Commissioner of Indian Affairs shall cause allotments to be made, in manner and quantity as provided by existing law, of the lands occupied and cultivated by any Indians on the portion of the reservation by said agreement ceded and relinquished, as required by article three thereof; and where such Indian occupants elect to remove to the diminished reservation he shall cause a schedule to be prepared showing the names of such occupants, the descriptions of the lands, and the character of the improvements thereon . . . 33 Stat. 352, 359.

The Secretary of the Interior shall fix a reasonable time within which such Indian occupants shall elect whether they will remain on the ceded tract or remove to the diminished reservation, and where they elect to remove he shall also fix a reasonable time within which such occupants must remove their improvements if they should choose to do so instead of having the same appraised and sold. 33 Stat. 352, 360.

In short, the exterior boundaries once encompassing the *ceded* area were automatically disestablished in precisely the same manner as the exterior boundaries of the original Lake Traverse Reservation, with the allotments therein also thrust onto the newly created public domain. The ceded lands, while not public lands for all purposes prior to actual settlement and entry, because of the peculiar trust arrangements therein, were most definitely made a part of the public domain— and without the public domain language on the face of the Act, argued by some to be a *sine qua non* of disestablishment.[6] But for the fact that the 1904 Crow opening, similar to the 1891 partial Crow opening discussed in detail in the Brief for Respondent, *DeCoteau*, only encompassed part of the Crow Reservation which thus *necessitated the new boundary discussion*, the effect of the 1904 Act on the exterior boundaries of the reservation would have been *truly* susceptible to the same sophisticated arguments of those who advocate that the original 1867 boundaries of the Lake Traverse Reservation remain as established in 1867.

The type of analysis that renders the *Ash Sheep* argument untenable with respect to the issue in the instant case, could similarly be utilized to demonstrate that *United States v.*

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6. This construction of the 1904 Crow Act was confirmed via a telephone conversation on October 3, 1974, with Mr. N.A. MacKenzie of the Bureau of Indian Affairs, Realty Division, located with the Crow Tribe in Harden, Montana. Mr. MacKenzie stated that the Bureau has always recognized the boundaries of the Crow Reservation as diminished by the 1904 Act.

Brindle, 110 U.S. 688 (1884), or any other decision of this Court near the turn of the century, is equally unpersuasive in this respect, but this is not the point. These decisions were not concerned with the issue now before this Court and, other than *United States v. Pelican*, 232 U.S. 442 (1914), *Seymour*, *supra*, and *Mattz*, *supra*, the State of South Dakota is not aware of any other decisions that were. Rather, all of the foregoing should conclusively establish something other than the fact that the advocates of the continued existence of the 1867 Lake Traverse Reservation boundaries could not provide this Court with even one Act legitimately on "all fours" with the Sisseton-Wahpeton sum-certain cession Act which did not disestablish a reservation or a portion thereof in precisely the same manner that the State of South Dakota now urges this Court to recognize. Namely, that the language of each Act and the surrounding circumstances and legislative history thereof must be independently examined in its proper historical perspective. Generalizations which are not soundly founded upon the documents of the period, and which do not reflect the tenor of the times, eventually destroy the very premises they are urged to support.

D. A Congressional Recognition. Both the Reply Brief for Petitioner in *DeCoteau*, and the Brief for the United States, *Amicus Curiae*, contain citations to certain phrases within recent legislation which are stated to stand for the proposition that Congress:

> Reaffirmed its consistent recognition of the Lake Traverse Reservation . . . .
> Confirmed that the Lake Traverse Reservation boundaries are today identical to those established by the Treaty of February 18, 1867 . . . . R.B.P. a 2-3, *DeCoteau*.
> Reaffirmed its view that the opening of the suprlus lands to non-Indian settlement did not terminate or diminish the Reservation . . . a clear indication of the congressional understanding that the Reservation was never abolished and always included non-trust land . . . .
> A recognition of the Reservation's existence beyond trust lands and its continued service as the home and political jurisdiction of the Sisseton-Wahpeton Tribe. B.U.S. at 27, 28.

Although the concession is made in the Brief for United States that "these recent acts are not determinative of an earlier congressional intent," which is, after all, *the* issue here, nevertheless it is maintained that they are "consistent *only* with the continuity of the Reservation's original boundaries and should be given weight." B.U.S. at 28 (emphasis added). Even to this limited extent, the State of South Dakota cannot agree.

On November 26, 1974, an inquiry was directed to each and every sponsor of the 1974 Acts in question, requesting a clarification as to the intent of Congress insofar as it related to the proposition for which the certain phrases in the Acts were being cited to this Court. Without exception, the sponsors of the legislation *emphatically* and *unequivocally* stated that this was *not* within the scope or purpose of the bills, and that at no time was the issue before this Court discussed, considered, or even mentioned during the pendency of the legislation. The full text of these responses is set forth as Appendices A, B, C, D, *infra*.

The purpose of one Act, P.L. 93-489 (1974), was simply to declare that ninety acres of federally owned land would be held in trust for the Sisseton-Wahpeton Tribe. The other Act, P.L. 93-491 (1974), was passed in order to allow the Tribe to consolidate its land holdings and eliminate the fractional heirship problem which is prevelant whenever Indian land has been held in trust by the United States for a period of years. In essence, both Acts represent nothing other than a commendable effort by the South Dakota Congressional Delegation to assist the Sisseton-Wahpeton Tribe. It is indeed unfortunate that this assistance should be seized upon and cited to this Court as probative evidence of a *formal congressional recognition* that the 1891 Act did not alter the boundaries of the original 1867 Reservation — simply because a natural, convenient, and shorthand method was used to describe the area in question, which had nothing

whatsoever to do with the purpose or the scope of the legislation.

Although the original source of the description could not be ascertained in the time available for its discovery, the entire incident fits squarely within the discussion of similar phrases and prepositions which have appeared in other acts dealing with other areas which were once "reservations," but were unquestionably disestablished and restored to the public domain. *See*, Appendix A and B.R. at 142-148, *DeCoteau*. In addition, it is representative of the extent to which the advocates of the 1867 boundaries have had to rely upon *any* source other than the documents of the period in question, in an attempt to refute the intent of Congress which is paramount therein.

E. The Law and Order Argument. The last general area remaining to be discussed centers around the assertions that if this Court recognizes the position of the State of South Dakota, there will be no law and order in the area in question, and chaos will prevail. N.A.R.F. at 4-5, B.U.S. at 11, 29, Brief for the Arapahoe Tribe, et al., at 16-17, R.B.P. at 10, *DeCoteau*.

It is understandable that counsel from Colorado, Washington, D.C., and New York, who are far removed from the area in question might suffer under this illusion, but for the United States Government, who has an obligation to all of the citizens of this country, to maintain that such a result would be "destructive of law and order" is inexcusable. B.U.S. at 11.

If, in the preparation of its Brief to this Court, the Office of the Solicitor General would have contacted those branches within the Federal Government more directly involved with the fact situation in South Dakota, such as the Indian Civil Rights Division of the Justice Department, or the local Office of the United States Attorney, the State of South Dakota sincerely believes this argument would *never* have been advanced. The repeated requests from the Federal Government to the State of South Dakota for a workable cross-deputization pact to prevent a complete break-down in law

and order brought about by the jurisdictional ramifications of several Federal Court decisions which recently *adopted the very result* urged in the Brief for the United States, aptly illustrates this precise point. With specific reference to the Sisseton-Wahpeton Tribe, one department of the Federal Government is requesting this Court, on the basis of a law and order policy argument, to reestablish the original boundaries of the Lake Traverse Reservation. At the same time, different agencies of the Federal Government, including the Indian Civil Rights Division of the Justice Department, the Bureau of Indian Affairs and the United States Attorney's Office, are asking the State of South Dakota to cooperate with them and this same tribe, within this same area, to prevent a complete break-down in law and order brought about by the very decision the United States is asking this Court to affirm: *United States ex rel. Feather v. Erickson*, 489 F.2d 99 (CA 8 1973).

While the State of South Dakota is admittedly disappointed that the United States could not agree with the position of the State on the merits of the issue of congressional intent, it is even more concerned that the policy arguments presented in the Brief for the United States at least reflect the *reality* of the situation. Efforts are now being made, through the Office of the Governor of the State of South Dakota, to bring this particular point to the attention of Attorney General Saxbe, but it is doubtful that the matter can be satisfactorily resolved before the date set for oral arguments.

In any event, it is beyond question that there is no reason to assume that the effective and established system which has administered law enforcement in this area of the State for over eighty years, could not continue to do so in the same fair and impartial manner. The checkerboard problem cited by the United States is non-existent for all practical purposes, as the Brief for Respondent at 191, 196-198, *DeCoteau*, initially pointed out. While trust land does constitute approximately 15 percent of the total land base of the area in question, only

1.5 percent of this land is actually resided upon or farmed by members of the Sisseton-Wahpeton Tribe. As a result, over ninety percent of the crimes committed by members of the Sisseton-Wahpeton Tribe, misdemeanors and felonies alike, occur in areas where the status of the land is not, for all practical purposes, even an issue. Compared to the problems which have occurred since the resurrection of the original 1867 boundaries by the Eighth Circuit Court of Appeals, the inconvenience of resorting to the "tract books" in a very limited number of cases would not be worth mentioning.

According to the United States Census of 1970, in addition to the 2,087 members of the Sisseton-Wahpeton Tribe, there are 54,501 non-member residents of the State of South Dakota living within the same five counties which would be, in whole or in part, encompassed by the original boundaries of the 1867 Lake Traverse Reservation. The fact that the Sisseton-Wahpeton Tribe, in 1974, *after* the decision of the Eighth Circuit in *United States ex rel. Feather v. Erickson, supra*, established a Tribal Court and a Tribal Code does not alter the geographical distribution of the member and non-member population, and any assumption that such a system could, even in the *foreseeable* future, adequately insure the protection of the lives and property of *all* the residents, under these circumstances, is simply not founded upon an objective appraisal of the problems inherent in such a reconstruction.[7]

7. Although the United States variously describes the Sisseton-Wahpeton Tribe as a "major Indian Tribe" (B.U.S. at 9), and a "populous Indian tribe" (B.U.S. at 29), some of the population estimates presented to this Court would seem to be in considerable excess of those stated in the 1970 United States Census. In this respect, it is interesting to note that there were only 600 members of the Sisseton-Wahpeton Tribe that voted in the 1974 Tribal Election.

8. The law and order problem within those areas of South Dakota that have always been designated as reservations is also reaching a near crisis level. Since this Court's attention was initially directed to the lesser dif-

[footnote continued]

III

SOME ARGUMENTS ADVANCED IN FAVOR OF THE RECOGNITION OF THE ORIGINAL 1867 BOUNDARIES OF THE LAKE TRAVERSE RESERVATION ACTUALLY SUPPORT THE POSITION OF THE STATE OF SOUTH DAKOTA.

Some of the Briefs of the proponents of the 1867 boundaries contain certain elements which cannot be treated collectively. In recognition of this fact, the following summary analysis is intended as a reply.

A. Brief for the Arapahoe Tribe, The Three Affiliated Tribes and The Confederated Salish and Kootenai Tribes, *Amici Curiae*. To the extent that this Brief recognizes what it terms certain "significant distinctions" between the 1891 Sisseton-Wahpeton "cession" statute and the Acts construed in *Seymour* and *Mattz*, and cautions this Court to carefully consider the provisions of a "cession" statute in the "clarifying light of its legislative history and surrounding circumstances and discern therefrom the Congressional intent," because in this case "no presumption arises in favor either of disestablishment or continuing reservation status," the State of South Dakota commends the efforts of the counsel involved. Brief for Arapahoe Tribe, et al., at 4, 12.

Similarly, another indication of the merits of the position of the State in this particular case can also be inferred from

[footnote continued from previous page]

ficulties of the month of August, 1974, (B.R. at 197-200, *DeCoteau*), there have been no less than five state-wide meetings on these and related issues. *See*, N.3 *supra*. Senator James Abourezk, Chairman of the Senate Sub-Committee on Indian Affairs, chaired the most recent session at Rapid City, South Dakota, on November 30, 1974, with over 500 individuals in attendance.

Although increased political factionism within the Tribal Organizations, with certain militant overtones, is undoubtedly one of the underlying reasons that the Tribal Police have not been able to cope with the rising intratribal violence, the teachings of the past would seem to point to certain basic defects within the multistructured jurisdictional system that exists therein. In addition, for all practical purposes, the Federal Government has never provided adequate law enforcement protection in any of these areas within the State of South Dakota — and the State is powerless to do so.

the alternative nature of the argument presented therein: Namely, a concession that, at worst, the legislative history and surrounding circumstances "can be cited as support for either disestablishment or continuing reservation status." Brief for Arapahoe Tribe, et al., at 21. In this respect, perhaps the most candid statement to date in any of the Briefs advocating the existence of the original 1867 boundaries of the Lake Traverse Reservation appears in the prefatory "STATEMENT OF INTEREST," wherein counsel advises this Court of the "significant distinctions" in the event the Court "does not adopt the position of respondent Indians in this case." Brief for Arapahoe Tribe, et al., at 4.

The most unequivocal, although admittedly inadvertent, support this proponent for the 1867 boundaries renders to the position of the State of South Dakota is the fact that, in the entire repertoire of settlement statutes cited in this Brief, the *Amici* could not cite to this Court even one "cession" statute of the Sisseton-Wahpeton type that did *not* disestablish and dissolve the exterior boundaries of a reservation or the portion thereof so affected. In light of the conceded effect of the other "cession" agreements on the boundaries of the reservations which were ratified in the same Act as the Sisseton-Wahpeton Agreement, this fact assumes a degree of additional significance.

B. Reply Brief for Petitioner, *DeCoteau*. The Reply Brief for Petitioner states that the use of the term "former reservation" in the documents cited by the State in the Brief for Respondent was "merely descriptive of the reservation lands opened for settlement." R.B.P. at 4, *DeCoteau*. This was precisely the point. The lands opened to settlement were no longer within the boundaries of the Lake Traverse Reservation because they had been restored to the public domain and hence were referred to as "formerly" within the Lake Traverse Reservation. Whether one prefers "former Sisseton Indian Reservation" or "former Lake Traverse Reservation," the State would submit that the phrase is susceptible of only one interpretation — especially when one also considers the

other evidence that the area in question was in fact restored to the public domain, such as the express statements to this effect by the members of Congress, and the unequivocal confirmation by the Commissioner of Indian Affairs and the Secretary of the Interior, in their Annual Reports, that 660,000 acres from the Lake Traverse Reservation had been restored to the public domain by the Act of March 3, 1891.

The fact that only nine such references were cited to the Court by the State, contrary to the implication in the Reply Brief for Petitioner, should not be so construed as to indicate that the list was exhaustive of each and every "former" reference available. As was initially pointed out in the Brief for Respondent, the same "former" designation appears in hundreds of other miscellaneous sources on file in the National Archives, Civil Division, Washington, D.C. B.R. at 8, *DeCoteau*. It was simply the opinion of the State that the point could be made with nine such references, spanning from 1891 to 1918, and authored by everyone from the Commissioner of Indian Affairs to the Chairman of the House Committee on Indian Affairs, as well as it could with ninety or nine hundred.

The Official Maps of the Office of Indian Affairs "showing" Indian Reservations within the United States, appended each year to the Annual Report of the Commissioner of Indian Affairs which were discussed at length in the Brief for Respondent, also support this construction. B.R. at 113-116, *DeCoteau*. The unequivocal removal of the Lake Traverse Reservation from the same maps immediately after the passage of the 1891 Sisseton-Wahpeton Act, and its designation as a "former" reservation some twenty-five years later, graphically illustrate this very point.[9]

Whatever assistance Petitioner hoped to gain from the fact that this same "former" designation appeared in the Senate

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9. Complete sets of these maps from the period of 1880-1920 were reproduced by the Library of Congress at the request of the State of South Dakota. Ten sets were lodged with the Office of the Clerk and two sets were supplied to opposing counsel.

and House Reports on the claims award of the Sisseton-Wahpeton in 1972, with other references which are purportedly evidence of a contrary nature, is more than negated by the learned opinion of the attorney who represented the Sisseton-Wahpeton Tribe before the Court of Claims. In 1972, Marvin J. Sonosky, of acknowledged expertise in this particular area of "settlement statutes," took the position, both in 18 N.Dak.L. Rev. 581, and before the Supreme Court of South Dakota in *State v. Molash*, 86 S.D. 558, 199 N.W.2d 591 (1972), that while *Seymour* was persuasive authority for *certain* settlement statutes, it did not include those situations, such as the cession of the Sisseton-Wahpeton Act, which *did* effectively disestablish the Lake Traverse Reservation in precisely the manner the State of South Dakota now urges this Court to recognize.[10]

Insofar as the repeated assertions that since 1867 everyone has administered the Lake Traverse Reservation as defined in the 1867 Treaty are concerned, the Brief for Respondent is replete with evidence to the contrary. In this instance, as in the case of the hypothetical "constructions" which are offered as alternatives to what is stated in the enabling act admitting the State of South Dakota to the Union, and in the Senate and House Reports and *Congressional Record*, to be the *reason for* and the *condition precedent* to the school land grant, the position of Petitioner, while it might be "plausible," is in irreconcilable conflict with express statements and action to the contrary.[11]

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10. Mr. Sonosky is currently representing the Rosebud Sioux Tribe in *Rosebud Sioux Tribe v. Kneip, et al.*, No. 74-1211 (CA8, pending). See App. III, IV, B.R., *DeCoteau*. The then unpublished opinion of the Hon. Judge Andrew W. Bogue, United States District Court, District of South Dakota, which was set forth in App. III at 143, *DeCoteau*, can now be cited as *Rosebud Sioux Tribe v. Kneip, et al.*, 375 F. Supp. 1065 (1974).

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11. In addition to the materials discussed at length in B.R. at 132-140, *DeCoteau*, the identical reasons for the school land grant also appear in the legislative history of the 1910 Act (36 Stat. 440) which "opened" one county

[footnote continued]

C. Brief for the United States, as *Amicus Curiae*. After having had over two months to respond, one could logically have expected that if any Brief should have squarely met each and every major argument of the State of South Dakota, it would have been the Brief for the United States as *Amicus Curiae*. However, as in all other instances, there is no reply to the remarks of Senator Dawes and the other congressmen that the area in question was to be restored to the public domain, or to the unequivocal confirmation of this fact in the Annual Reports of the Secretary of the Interior and the Commissioner of Indian Affairs that the Act in question *would* and *did* restore 660,000 acres to the public domain from the Lake Traverse Reservation. Nor does the United States even mention the fact that the same Act which ratified the Sisseton-Wahpeton Agreement restored approximately *seven million (7,000,000)* acres of land to the public domain by the ratification of six other agreements that disestablished each and every reservation or portion thereof effected, in precisely

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[footnote continued from previous page]

of the Pine Ridge Reservation in South Dakota:

> Mr. GAMBLE. I may say in reply, Mr. President, referring to the enabling act providing for the admission of North and South Dakota, Montana, and Washington, that sections 16 and 36 in each township were granted to the separate States in each State for the benefit of the common schools; but in the States where there were Indian reservations, it provided that the grant should not take effect until the lands were opened to settlement, *or, in other words, became a part of the public domain. By the passage of the bill in question the lands so opened become a part of the public domain and open to settlement*, and the grant in the enabling act becomes immediately operative and conveys sections 16 and 36 in each township to the State. That was a contract between the Government and the several States as provided by the act of admission. The State of South Dakota is clearly entitled to the school lands, free from any charge to the State. 45 Cong. Rec. 1502 (1910) (emphasis added).

Although the enabling act for the State of Washington was said to be identical to that of South Dakota, it is interesting to note that the 1906 Colville Act (34 Stat. 80) presented in *Seymour v. Superintendent*, 368 U.S. 351 (1962), did *not* contain the school land grant and neither did the 1892 Klamath River Act (27 Stat. 52) construed in *Mattz v. Arnett*, 412 U.S. 481 (1973). *See*, B.R. at 179-184, *DeCoteau*.

the same manner that the State of South Dakota is now urging this Court to recognize. As *Amicus Curiae* to this Court, the United States does not bother to respond to the fact that the decision below created a conflict between the Circuits, in addition to overruling the established precedent within the Eighth Circuit. The analysis of the Tenth Circuit, through the viability of *Ellis v. Page*, 351F.2d 250 (CA 10 1965), *aff'g Ellis v. State*, 386 P.2d 326 (Okl.Cr. 1963), which directly or by innuendo declares the *non-reservation* status of the western one-half of Oklahoma and untold other areas, is certainly deserving of at least a cursory recognition of some sort.[12]

The arguments that are advanced do not readily lend themselves to analysis: "former" reservation does not really mean "former" reservation (B.U.S., N.8 at 26), "subject to the laws of the state" does not really mean "subject to the laws of the state" (B.U.S. at 21), and the school land grant was not really premised on the condition precedent in the enabling act that the reservation be extinguished and the lands restored to the public domain, as the House and Senate Reports and the *Congressional Record*, time and time again reiterate, but rather was somehow related to another statute passed four years *after* the Sisseton-Wahpeton Act, which was never mentioned in conjunction with any school land grant to the State of South Dakota. B.U.S., N. 8 at 21.

Moreover, even after it was pointed out that the Proclamations "opening" other reservations which unquestionably were disestablished, described the land in question as "on," "in" or "within" the reservations so opened, the United States still maintains that the same prepositional phrases within the Sisseton-Wahpeton Proclamation con-

12. Other than the decision below, the State of South Dakota is not aware of any decision in any Circuit that conflicts with either *DeMarrias v. State of South Dakota*, 319 F.2d 845 (CA 8 1963) or *Ellis v. Page*, 351 F.2d 250 (CA 10 1965) insofar as the construction of similar *cession* agreements is concerned. It would be impossible to determine the precise land base that is declared to be of a "non-reservation" status under the purview of these two cases.

stitute "the most important administrative interpretation of the 1891 Act." B.U.S. at 22. Along these same lines, the State specifically set forth *Land Decisions* (B.R. at 147, *DeCoteau*) which described the ceded area of the Great Sioux Reservation in precisely the same manner as the Decisions cited initially in the Brief for Petitioner, *DeCoteau*. Yet the Brief for the United States nevertheless still includes these same citations under the subheading that "SUBSEQUENT ADMINISTRATIVE AND LEGISLATIVE ACTIONS CONFIRM THAT THE 1891 ACT DID NOT DISESTABLISH THE 1867 TREATY BOUNDARIES." B.U.S. at 22-23. Indeed, most of the affirmative arguments of the United States, in this respect, could be similarly documented to resurrect the boundaries of reservations that were specifically and unquestionably disestablished on the face of any one of a number of different statutes.

In summary, in light of the three statutes that *disestablished* reservations, cited as examples of homesteading "within reservation boundaries" in the earlier Memorandum for the United States, and the *Ash Sheep* cession argument, which flies in the face of the 1904 Crow Act construed therein, the State of South Dakota still deems the position of the United States in *DeMarrias v. State of South Dakota*, 319 F.2d 845 (CA 8 1963), that the 1891 Sisseton-Wahpeton Act disestablished the Lake Traverse Reservation by restoring all the unallotted land therein to the public domain, substantially more persuasive. B.R. at 165-166, *DeCoteau*.

D. The Arguments of Substance. In conjunction with the Brief for Respondent, submitted in *DeCoteau v. District County Court*, No. 73-1148, the State of South Dakota has attempted to at least address the merits of *all* of the substantive arguments advanced to date in the Briefs advocating a recognition of the original boundaries of the 1867 Lake Traverse Reservation. The failure to do so in any particular instance can in good faith be attributed to mere inadvertence and can be clarified at the time set for oral argument.

IV

THE BACKGROUND OF THE GENERAL ALLOTMENT ACT IS CONSONANT WITH THE POSITION OF THE STATE OF SOUTH DAKOTA.

In both the Brief for Petitioner, *Erickson*, and the Brief for Respondent, *DeCoteau*, the State of South Dakota offered the suggestion that additional research into the legislative history of the General Allotment Act would undoubtedly be of some assistance to this Court in resolving the very difficult question that has been presented. B.P. at 73-74, *Feather*, B.R. at 71-72, *DeCoteau*. Although the entire task could not be completed in time for a formal presentation by way of written motion and in the form of a separate Brief, the State has substantially completed a summary examination of the legislative history of the Act from its origins in 1879 through enactment in 1887. Act of February 8, 1887, 24 Stat. 388.

Very few passages in the House and Senate Reports or in the entire *Congressional Record* were actually addressed to the precise issue before this Court. However, the *tenor* of the entire proceeding is wholly and unequivocally in support of the position of the State of South Dakota. As the *Congressional Record* reflects, it was almost as if Congress assumed that posterity would know the effect any statute dealing with the cession or sale of a portion of any Indian reservation would necessarily have on the status of the lands so sold or ceded and on the exterior boundaries encompassing the same.

While not replete with such passages, the following statement of Senator Dolph of Oregon, is the most representative and singularly comprehensive explanation of this aspect of the Act that the State of South Dakota was able to locate in the entire *Congressional Record*:

> Mr. DOLPH. The policy of the Government for a long time past has been to put the Indians upon reservations and to purchase the title to the lands formerly held by them; until now they are confined to reservations mainly in the Western States and the Territories. The bill proposes a radical change in the Indian policy. It proposes to authorize the President in his discretion at any time to allot the lands in these reservations in severalty to the Indians located thereon in certain quanitities, and authorizes the purchase of the balance of the reservations by the General Government through the Secretary of the Interior.
>
> At the present time, or at least in 1880, which is the date of the last statistics I happen to have, the total number of Indian reservations in the United States was 147. Those reservations contained 154,436,362 acres. The estimated Indian population at that date was 255,998, which gave about 603.40 acres of land to each Indian. *After purchase of the right of occupancy from the Indians and setting aside portions of the reservations to be held by them in severalty under the operation of this bill, I suppose that something over two-thirds of the area of the present Indian reservations will be restored to the public domain, amounting to over 100,000,000 acres.* 15 *Cong. Rec.* 2277 (1884) (emphasis added).

Earlier remarks by Senators Coke and Morgan reflect the import of the above passage, though in less unequivocal terms:

> Mr. COKE. . . . The theory of the bill in the minds of the members of the committee, I am satisfied, is that the money which may be produced by a sale to the Government of the lands not allotted is necessary to aid the Indians in improving their severalty allotments and otherwise supporting them. I object to the amendment because it seems to anticipate that the Indians may take in severalty just what they want, *and keep the other locked up as a reservation not sold to the Government*, when it is the intention of the bill, when one of the main objects sought to be attained by the bill is to *break up these great reservations*, which lock up vast sections of valuable country from occupancy and from cultivation. That is one of the great objects of the bill. The fact that these reservations do exist, that Indians are protected upon them, and that the whites will intrude upon them, has been the cause of much the greater number of our Indian wars. We desire to get that prolific cause of trouble out of the way. We desire to provide the Indian with all the

land he possibly needs, that his stock can graze upon, out of his reservation, and for the *rest of it we desire to pay him a fair price and have it belong to the Government*. 11 Cong. Rec. 909 (1881) (emphasis added).

> Mr. Morgan. . . . I do not believe there is a lawyer in the United States who upon a careful examination and consideration of this bill would differ with me upon that proposition in connection with it. Here is a grant of land made by act of Congress and by treaty to the Indians and they hold and occupy it until Congress shall otherwise direct, and Congress comes in and says that it will not otherwise direct until two-thirds of the male members of each tribe shall consent that it shall otherwise direct. Putting these enactments together and considering them *in pari materia*, it seems to me to be impossible to hold otherwise than that this is a proclamation of a grant to the Indians in perpetuity *until such time as two-thirds of the male members of each Indian tribe entitled to a reservation shall give their consent to give it up*. 11 *Cong. Rec.* 1000 (1881) (emphasis added).

Later, on February 18, 1886, Senator Dawes succinctly put the issue in a proper perspective.

> Mr. DAWES. . . . Further on in the bill it also authorizes the Secretary of the Interior to take up all three classes of reservations, the treaty reservation, the statute reservation, and the executive-order reservation, and by negotiation or otherwise to *reduce the limits* and open up to the public all those parts of those reservations not necessary for the purpose of maintaining upon the reservation such of these Indians as in his opinion he can not wisely put out upon the land.
>
> . . . I supposed that the bill would make a very *great advance in the reduction of all reservations*, treaty, statute, and executive-order reservations, because for the first time it clothes our officials with power to take up each one of these reservations, and, in the light of the present day, and of the present condition of the Indians and of the soil, *to cut it down to present necessities*. All that, by the amendment of the Senator from Kansas, will be stricken out of this bill, and this will be a bill only to treat with the Indians upon the treaty and statute reservations. 17 *Cong. Rec.* 1630, 1631 (1886) (emphasis added).[13]

In short, what was termed the "Chinese Wall" was to be broken down and entirely eradicated.

> . . . Individual rights, action, and responsibility can only work this change in the condition of the Indian; he must no longer be surrounded by a "Chinese wall." The bill contains other provisions by which the United States may, with consent of Congress, secure title to all lands not thus allotted in severalty. H.R. Rep. No. 2247, 48th Cong., 2nd Sess. 1 (1885).

The work of D. S. Otis, *The Dawes Act And The Allotment of Indian Lands*, 5-7 (1972 Edition) is a convenient source of some of the citations to the legislative history of the Dawes Act. In certain specific instances even the text supports the position of the State. *See* pp. 17, 19, 32, 87, 141-142.

More importantly, however, the text contains citations that the State had overlooked to other documents such as the Annual Reports of Board of Indian Commissioners which specifically and unequivocally buttress the substance of what is contained in the Annual Reports of the Secretary of the Interior and Commissioner of Indian Affairs, *supra*, in conjunction with the discussion of the 1887 Act.

With specific reference to the 1891 Sisseton-Wahpeton Act, the 1891 Report of the Board concludes that:

> The work of allotting lands in severalty to Indians and securing to them separate homesteads has been continued, and we see no reason to doubt the wisdom of the policy. During the year 2,104

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13. In other portions of the debate, "to cut it down to present necessities" was variously referred to as the "sales of their reservation" or the process whereby the remainder of the area in question was the "residue of the reservation sold." 18 *Cong. Rec.* 974 (1887).

> patents have been issued and 2,830 allotments have been approved and the issuance of patents directed. Already more than 16,000 Indians have become citizens of the United States, and about 4,000 more, by taking allotments, are soon to become citizens. Adding the 7,610 in Oklahoma who have received allotments under agreements ratified by the last Congress, we have a total of 27,610 Indian American citizens, subject to the same laws and entitled to the same privileges as other citizens; and they have *surrendered to the United States about 23,000,000 acres, which have become a part of the public domain and open for settlement and improvement.* Report of the Board of Indian Commissioners, 7, (1891) (emphasis added).

The Appendix thereto contains similar statements of Gen. E. Whittlesey, the chief negotiator of the 1891 Sisseton-Wahpeton Act, Merrill E. Gates, the President of the Board, the Commissioner of Indian Affairs, the Hon. Thomas J. Morgan:

> General Whittlesey. . . . Two years ago there were, counting all the little Mission Indian reservations in Southern California as one, and all the Pueblos in New Mexico as one, 138 reservations, comprising 104,314,349 acres of land. During the year 1890 these reservations were reduced to the amount of 12,000,000 acres, and during 1891 they have been *reduced* 8,000,000 more. I quote round numbers only. *So something over 20,000,000 acres have been cut off from reservations and added to the public domain, and these have been, or are soon to be, thrown open to the settlement of whites.*

> President Gates. . . . The vast domain of land occupied by the Indians must be cut up. If we remember that 104,000,000 of acres of land (a territory two-thirds as large as that of France or

> Spain) are held by the Indians in nominal occupancy, we shall see that before titles to that land should be confirmed to the Indians forever to be held by them to rove over while the game they used to hunt has disappeared, we need to consider what is true tenure of land — what gives a title to land. Let no one understand me as opposed to giving compensation for unused land which we take by agreement from the Indians. *They can not hold all this land perpetually outside the sphere of civilization. Twenty-one million acres out of the 125,000,000 with the assent of the Indians, have been put back into the public domain and opened to settlers within the last three years.*

> Mr. MORGAN. . . . There is growth in public sentiment; there has been progress in legislation and in determining more accurately, by the progress of legislation, on a settled policy of administration. We understand more clearly than ever before what the Government is attempting to do for the Indians. *The Indians themselves are coming to understand that the reservations are to be reduced and the surplus is to be restored to the public domains;* that their lands are to be alloted in severalty, and that they are to be treated as individuals and not as tribes; that they are to be citizens of the United States, and that they are to adjust themselves to the conditions thus forced upon them. Report of the Board of Indian Commissioners, 51, 124, 133 (1891) (emphasis added).

It is the position of the State of South Dakota that the language of the 1891 Sisseton-Wahpeton Act, and the legislative history and surrounding circumstances thereof, are sufficiently persuasive in their entirely to be determinative of the issue which has been presented. The background of the General Allotment Act is wholly consonant with this position. The material set forth above is intended only to reply to the inference to the contrary in some of the Briefs submitted to date.

CONCLUSION

It is respectfully submitted that the ruling of the Eighth Circuit Court of Appeals is erroneous. It should be reversed and that court instructed to deny Respondents' applications for writs of habeas corpus.

Respectfully submitted,

KERMIT A. SANDE
Attorney General of South Dakota

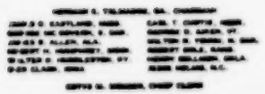
WALTER W. ANDRE
Assistant Attorney General

TOM D. TOBIN
Special Assistant Attorney General

Attorneys for Petitioner

December 1974

APPENDIX A



United States Senate

COMMITTEE ON
AGRICULTURE AND FORESTRY
WASHINGTON, D.C. 20510

December 5, 1974

Dear Mr. Tobin:

You had earlier called my office to ask about Congressional intent in the drafting and passage of two pieces of legislation wherein was referred to the "boundaries" of a reservation. The government now in the cases of **De Coteau v. Tenth** District Court and Erickson v. Feather cites in its amicus brief (p. 27) that the language of P. L. 93-489 and P. L. 93-491 is the basis for a "Congressional understanding that the Reservation was never abolished and always included non-trust lands."

This is to inform you that the term "reservation" was used generically, that the substance of the legislation was for the benefit of Indians only, and that at no time did the U. S. Senate either take up or dispose of the question of reservation boundaries of the Lake Traverse Indian Reservation.

With every good wish, I am

Sincerely,

George McGovern

Tom Tobin, Esq.
Winner, SD 57580

APPENDIX B

JAMES ABOUREZK
SOUTH DAKOTA

United States Senate
WASHINGTON, D.C. 20510

December 2, 1974

Mr. Tom Tobin
Attorney at Law
Winner, South Dakota 57580

Dear Mr. Tobin:

This letter is in response to your inquiry about Congressional intent with respect to two cases now pending: DeCoteau v. Tenth District Court, and Erickson v. Feather. The Government cites in its amicus brief (p. 27) PL 93-489 and PL 93-491 as a basis for a "congressional understanding that the Reservation was never abolished and always included non-trust land."

This is to inform you that at no time during the deliberation of this legislation did the U.S. Senate either take up, or dispose of, the question of reservation boundaries of the Lake Traverse Indian Reservation.

Sincerely,

James Abourezk
United States Senate

cc: Hon. Robert Bork
Solicitor General of the United States

Mr. Bert Hirsch
American Association of Indian Affairs

APPENDIX C

JAMES ABDNOR
[illegible]

Congress of the United States
House of Representatives
Washington, D.C. 20515

December 5, 1974

PUBLIC WORKS
[illegible]
VETERANS' AFFAIRS
[illegible]

Mr. Tom Tobin
Special Assistant to the Attorney
General of South Dakota
Winner, South Dakota 57580

Dear Mr. Tobin:

This letter is in response to your inquiry about Congressional intent with respect to two cases now pending: DeCoteau v. Tenth District Court, and Erickson v. Feather. The Government cites in its amicus brief (p.27) PL 93-489 and PL 93-491 as a basis for a "congressional understanding that the Reservation was never abolished and always included non-trust land."

I was present when the House of Representatives considered this legislation and of course took a special interest in it as it pertains to my state. From my recollection and my review of the record I concludes that at no time during the deliberation of this legislation did the House of Representatives either take up, or dispose of the question of reservation boundaries of the Lake Traverse Indian Reservation.

Sincerely,

JAMES ABDNOR
Member of Congress

JA/hga

APPENDIX D

FRANK E. DENHOLM

Congress of the United States
House of Representatives
Washington, D.C. 20515

December 6, 1974

Thomas Tobin, Esq., Special Assistant
Office of the Attorney General
State of South Dakota
Winner, South Dakota 57580

Re: Public Law 93-489 and 93-491
and Your Inquiry of 11/26/74

Dear Mr: Tobin:

The above referenced legislation enacted by the Congress pertained and does pertain only to specific lands as described therein.

The reference to Public Law 93-489 and Public Law 93-491 in the Reply Brief of the Petitioner in the matter entitled, "De Coteau vs. The District County Court, et.al." is for judgment of the Court. The intent and purpose of the Congress is clear upon enactment of the laws as provided therein.

It is my opinion that it was not the objective of the authors, the sponsors or those that voted for or against the enactment of P.L. 93-489 or P.L. 93-491 to determine the broader and far more comprehensive issues of jurisdiction and there is nothing in the legislative history of record contrary to my conclusion accordingly.

Thank you very much.

Sincerely,

Frank E. Denholm

FRANK E. DENHOLM, M.C.